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In the

Supreme Court of the United States

October Term, 1995

Joan K. Heinmiller,

Petitioner,

v.

Department of Health,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTIONS PRESENTED

1. Whether the Washington State Supreme Court opinion violates Petitioner's right to due process of law guaranteed by the Fourteenth Amendment because RCW 18.130.180 is unconstitutionally vague as applied to Petitioner.

2. Whether the opinion violates Petitioner's right to due process of law because Heinmiller was punished for lawful conduct predating the Uniform Disciplinary Act's application to her and thereby imposed the law retroactively.

3. Whether the Washington State Supreme Court opinion finding of violation of RCW 18.130.180(22) by "harassment" violated Petitioner's right to due process of law and to free speech.

4. Whether a punishment imposed on Heinmiller that was not reasonably related to the provisions of the Uniform Disciplinary Act that Heinmiller was found to have violated violates her rights to due process and equal protection under law.

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95-___

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Joan K. Heinmiller,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner Joan K. Heinmiller prays that the Court issue a writ of certiorari to the Washington State Supreme Court to review the opinion of that court and judgment in Joan K. Heinmiller v. Department of Health, Case No. 61901-8.

OPINIONS BELOW

The opinion of the Washington State Supreme Court, filed October 5, 1995, reported at 127 Wn.2d 595 (1995), and is in Appendix A. The Order Changing Opinion dated January 31, 1996 is set forth in Appendix B. The Order Granting Motion for Reconsideration, In Part, Without New Argument, dated January 31, 1996, is in Appendix C. A letter from the Deputy Clerk of the Washington State Supreme Court correcting a typographical error in Order Changing Opinion ("application of RCW 18.130.180(1) and (22)" should read "application of RCW 18.130.180(1) and (24)") dated March 8, 1996 is in Appendix D. The Superior Court Order Affirming Findings of Fact, Conclusions of Law and Final Order dated May 10,1994 is in Appendix E. The Department of Health Review Officer's Findings of Fact, Conclusions of Law and Final Order dated March 31, 1993 are in Appendix F. The Administrative Law Judge's Findings of Fact, Conclusions of Law and Interim Order dated September 25, 1992 are in Appendix G.

JURISDICTION

The decision terminating discretionary review of the Washington State Supreme Court was entered on January 31,

1996. The Court has jurisdiction to review the decision under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

RCW 18.130 180 and in pertinent part RCW 18.19 are set forth in Appendix H. Section 1 of the Fourteenth Amendment, the First Amendment and Article I, § 9, cl. 3, and § 10, cl. 1 to the United States Constitution are set forth in Appendix I.

STATEMENT OF THE CASE[1]

During 1985, Joan Heinmiller was a social worker and counselor at the Valley Cities Mental Health Center ("Valley Cities") in Auburn, Washington.[2] She gave outpatient, short-term counseling services to individuals. Findings of Fact ("FF") 1.3-.4, App. F at 5. In November 1985, M.B.

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[1] Abbreviations used below are for Findings of Fact ("FF"); Conclusions of Law ("CL"); Report of Proceedings before Administrative Law Judge Stanford [hearing testimony] ("RP"); Stipulated Record of Exhibits below as Stipulated in a Joint Appendix of "Clerk's Papers" for the Washington State Supreme Court ("CP"); Appendices herein ("App.").

[2] Most points below are based on findings of fact of the Administrative Law Judge, as modified by the Review Officer.

contacted Valley Cities seeking counseling for panic attacks and a general loss of joy in her life. M.B. saw Heinmiller for sessions on generally a weekly basis through August 27, 1986. FF 1.10. App. F at 7. M.B. commented during counseling about her difficulties having rewarding relationships with men. Conversely, she described relationships with several women as unique, warm, intimate and supportive. At the May 14, 1986 session, Heinmiller raised the issue of sexual orientation. FF 1.15-.16, App. F at 9-10. As a clinician Heinmiller felt that she had identified a possibility that might be addressed if M.B. wished to pursue it.[3] M.B. responded that she did not identify herself as a lesbian and had never found herself physically attracted to women. FF 1.28-.29, App. F at 15-16. However, M.B. began to form a romantic and sexual interest in Heinmiller. M.B. did not tell Heinmiller about her romantic and sexual feelings towards her. FF 1.31, App. F at 17.

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[3] Dr. Fink, the Department's expert, testified that M.B.'s sexual orientation was a legitimate, reasonable therapeutic inquiry (RP 403).

During the June 11, 1986 counseling session, Heinmiller suggested to M.B. that they could become friends when she was finished with therapy. FF 1.36-.37, App. F at 19. Heinmiller said that any friendship that occurred after termination of therapy would not be therapeutic or as counselor/client. RP 716-17. Heinmiller also told M.B. that she needed to be sure she was done with therapy before she moved out of therapy and into a potential friendship. RP 718. At the July 18 session M.B. had described her three-week trip to Europe with her mother and successful application of concepts learned during therapy with Heinmiller. FF 1.39, App. F at 20. Termination of therapy was discussed on July 23, 1986. FF 1.40, App. F at 20-21. At the July 30, 1986 session, M.B. and Heinmiller agreed that their next session would probably be the last. FF 1.42, App. F at 21-22.

On August 14, 1986, M.B. dictated a tape recording for Heinmiller. This included a reading of a composition M.B. had written and thoughts on her therapy and recovery. In the tape M.B. thanked Heinmiller for help and guidance in getting her "to the other side," a phrase Heinmiller had used in therapy to describe the successful completion of therapy.

FF 1.43, CP 23-25; RP 720, 725-28. Heinmiller viewed the tape as a final validation of the therapy and believed that M.B.'s disorder had been corrected. FF 1.44, App. F at 25. In a card dated August 17, 1986, Heinmiller thanked M.B. for the tape. FF 1.45, App. F at 25-26. The tape had revealed to Heinmiller M.B.'s writing talents, sensitivity and perceptivity. The final counseling session occurred on August 27, 1986. M.B.'s accomplishments were reviewed and her new sense of self affirmed. CP 1137. M.B. and Heinmiller agreed to meet in a social context. FF 1.48, App. F at 27.

On August 28, 1986, Heinmiller and M.B. met in the afternoon at Saltwater State Park. After walking and exchanging thoughts, Heinmiller disclosed that she was a lesbian and living with a woman. M.B. told Heinmiller that she was in love with her and had physical feelings for her. Later that evening, sexual contact occurred. FF 1.61, App. F at 33-34. For two years Heinmiller and M.B. maintained a romantic relationship, which ended on or about August 3, 1988, after M.B. informed Heinmiller that she no longer wanted to see her. FF 1.81-.83, App. F at 42-43.

M.B. commenced therapy with another counselor after ending regular contacts with Heinmiller. FF 1.85-.87, App. F at 43-44. On November 28, 1988, M.B. told Heinmiller that she did not want to talk to her, and asked Heinmiller not to call, but expressly said that Heinmiller could write to her. Heinmiller wrote M.B. seeking reconciliation and questioning treatment provided by M.B.'s current therapists. Heinmiller's letters were motivated by love for M.B., whom she believed was suffering from possible schizophrenia and not receiving proper treatment. RP 398-99; 510-11; FF 1.104, App. F at 52. About one year after their breakup, in September 1989, M.B. instituted a civil lawsuit against Heinmiller. FF 1.91, App. F at 47. This suit was resolved by settlement. Almost two years after their relationship ended, on July 20, 1990, a Department investigator notified Heinmiller that M.B. had filed a complaint against her with the Department. FF 1.92, App. F at 47. On June 24, 1991, the Department filed a Statement of Charges against Heinmiller alleging unprofessional conduct in violation of RCW 18.130.180. CP 104-107.[4]

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[4] The Uniform Disciplinary Act became applicable to counselors

The Department alleged that Heinmiller's sexual relationship with M.B. in 1986 constituted moral turpitude, malpractice and sexual contact with a client in violation of the Uniform Disciplinary Act (the "Act"). RCW 18.130.180(1), (4) and (24). In so doing the Department attempted to apply the Act retroactively. The Department charged that Heinmiller's failure to report her private relationship with M.B. in her October 17, 1988, application for certification as a social worker constituted a misrepresentation that she had not engaged in conduct that violated the Act within ten years. RCW 18.130.180(2). Finally, the Department alleged that Heinmiller through letters had threatened and harassed M.B. in violation of the Act. RCW 18.130.180(22). CP 104-107.

Hearings on the Department's charges of unprofessional conduct were held before Administrative Law Judge James D. Stanford ("ALJ") in February, April and May of 1992. The ALJ ruled that the Act could not be applied retroactively to Heinmiller's conduct before July 26, 1987, the

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and social workers on July 26, 1987, on passage of the OMNIBUS Credentialing Act for Counselors ("OCAC"). RCW 18.19.050(2). Heinmiller registered as a counselor on February 2, 1988, and applied for certification as a social worker on October 17, 1988. FF 1.1, App. F at 4.

date the Act became applicable to her, RP 11-14. On September 25, 1992, the ALJ issued his Findings of Fact, Conclusions of Law, and Initial Order. He concluded that it was unprofessional conduct for Heinmiller to misrepresent or conceal a material fact on her October 1988 social work certification application. Conclusions of Law (hereinafter "CL") 2.17-2.31, App. G at 59-64. He determined that Heinmiller's pre-Act conduct in 1986, in her relationship with M.B., constituted moral turpitude and sexual contact with a client in violation of the Act, but not malpractice, and that she should have so reported on the application. CL 2.24-41, App. G at 61-64. The ALJ also concluded that Heinmiller had threatened M.B. CL 2.36, App. G at 66. The ALJ recommended a three-year suspension of Heinmiller's registration and certification and a fine, but that suspensions be deferred on condition that Heinmiller advise each clinic with whom she was associated of her status, that she not treat individuals with sexual orientation or identity issues, and that she not violate the Act. App. G at 71-72.

Both parties filed petitions for review with the Department. On March 31, 1993, the Department Review

Officer Colleen Klein issued Findings of Fact, Conclusions of Law, and Final Order. App. F. The Review Officer concluded that Heinmiller's pre-Act sexual relationship with M.B. constituted moral turpitude, malpractice and sexual contact with a client in violation of the Act. FF 2.28-.32, App. F at 72-75. The Review Officer found that Heinmiller "knew or should have known" that her representation on her certification application was false. FF 2.42-.43, App. F at 74-80, CP 64-65. Heinmiller's letters to M.B. were also concluded to have been written with intent to threaten or harass M.B. FF 2.47-2.48, App. F at 82, CP 66.

The Review Officer increased Heinmiller's discipline from a three-year deferred suspension to an indefinite suspension of her licenses.[5] A partial stay of suspension is not likely, nor is a

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[5] The Final Order provides that Heinmiller may ask for a partial stay of the suspension (which the Department may deny or grant with conditions) only if she submits (a) a detailed written employment plan approved by the Department, (b) a current psychological evaluation by a preapproved licensed professional who has received a copy of the Review Officer's Order before evaluation, (c) a certification verifying her satisfactory completion of at least thirty hours of pre-approved training on "boundary issues," and (d) any other information or reports that the Department deems necessary. Heinmiller may not request full reinstatement for six years and then only if she has received a partial stay,

reinstatement, for it is difficult to imagine an employer who would hire Heinmiller or a psychologist or supervisor who would review her with objectivity after a review of the Final Order that contains not only the Department's conclusions but also inflammatory charges of M.B. about alleged abuse which were rejected for failure of proof. On May 10, 1994, the Review Officer's Findings of Fact, Conclusions of Law and Final Order were affirmed upon Heinmiller's appeal to the superior court except Judge Lasnik expressly determined that there was no sexual contact before the therapy terminated. App. E, paragraph 7, at 5.

The Supreme Court of the State of Washington granted a petition for direct review and on appeal held that the Department's determination that Heinmiller committed unprofessional conduct in violation of the Act was supported by the evidence, consistent with law and not arbitrary and capricious, and thereby affirmed the judgment. The Washington State Supreme Court considered

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submits acceptable written verification that she has satisfactorily practiced counseling for three consecutive years under the supervision of a preapproved licensed mental health professional who has received the Department's Final Order, submits to another psychological evaluation, and submits any other information the Department deems necessary. Even if Heinmiller complies with these requirements, the Department may deny her request for reinstatement. Final Order, App. F at 89-92.

whether Heinmiller had violated RCW 18.130.180(2), pursuant to which a "misrepresentation or concealment of a material fact in obtaining a license" will constitute unprofessional conduct. In October 1988, after seventeen years of counseling experience, Heinmiller had voluntarily sought certification as a social worker, though that was not required to work as a counselor in Washington. Heinmiller responded "No" to this question on an application:

> WITHIN THE PAST 10 YEARS HAVE YOU ENGAGED IN ANY OF THE CONDUCT DESCRIBED IN THE UNIFORM DISCIPLINARY ACT, 18.130.180 RCW, EXCLUDING THE CONDUCT DESCRIBED IN 18.130.180(6) AND 18.130.180(23)?

The Washington State Supreme Court held that Heinmiller "should have known" that her answer was false and that that was a sufficient basis to conclude that she had made a misrepresentation. The Washington Supreme Court permitted in substance a retroactive application of the Uniform Disciplinary Act to the period pre-dating its application to Heinmiller under the rationale of finding a "misrepresentation." In its Order Changing Opinion, App. B, the Washington State Supreme Court recognized that its discussions of RCW 18.130.180(1), reciting that "any act

involving moral turpitude" would constitute unprofessional conduct and RCW 18.130.180(24), reciting that "sexual contact with a client or patient" would constitute unprofessional conduct, did not apply directly to Heinmiller's conduct and were pertinent only to the extent that they showed that Heinmiller had made a misrepresentation when she responded negatively to the application form question asking her if her conduct within the prior ten years had been prescribed by the Uniform Disciplinary Act. However, the punishment on its face relates to the underlying violations determined retroactively of RCW 18.130.180(1) and (24). The Washington State Supreme Court also affirmed a Department determination of "threats or harassment" against M.B. in violation of RCW 18.130(22).

Heinmiller did not have fair notice that her negative response to the question in her application could be considered to be a misrepresentation. The separate opinion of Justices Pekelis, Johnson and Alexander, disagreeing with the majority's view on this issue, makes clear:

> [T]o discipline a person not because she knew, but because she *should* have known that her conduct would be deemed by others to

constitute an act of "moral turpitude" makes the Department's action almost Kafkaesque. What constitutes an act of "moral turpitude" is difficult to ascertain with any precision. Asking an applicant to evaluate her past conduct by such an amorphous concept merely sets a trap which can snare even applicants who attempt to be forthright and honest in their responses. It does nothing to protect the public from unfit applicants.

The inequities created by using a constructive knowledge definition for "misrepresentation" are even more sharply demonstrated by analyzing the Department's determination that Heinmiller "should have known" that M.B. was still her client when they first had sexual contact. There is some evidence to support the Department's finding that the social worker/client relationship continued, but at the same time there is evidence that the relationship had ended. Heinmiller and M.B. mutually agreed to end their professional relationship before they had sexual contact. At that point, all formal indicia of a professional relationship were terminated and never resumed. There are no further appointments or payment for services and Heinmiller and M.B. no longer held themselves out as having a current professional relationship.. It is, thus, understandable how, in total good faith, Heinmiller could answer in the negative when asked whether she had sexual contact with a client.

Heinmiller's plight is similar to that of millions of American citizens who deal with state administrative agencies to make their living. This Court should review this case to ensure that Due Process is provided to such persons.

Petitioner's contention that RCW 18.130.180 was unconstitutionally vague as applied to her was raised to the Superior Court for the State of Washington and on appeal to the Washington State Supreme Court, and was expressly ruled upon by the Washington State Supreme Court. App. A at 13-15. Petitioner's argument that consideration of pre-Act conduct was a retroactive application of law was presented to the ALJ and ruled upon by the ALJ and the Review Judge in their conclusions of law. FF 2.15, App. F at 66; CL 2.14, 2.37, App. G at 58,66. The ALJ and Review Judge held that the law should not apply retroactively, but permitted evidence of such to be considered in connection with the claim of "misrepresentation." This issue on retroactive application of law was argued and briefed to the Superior Court, and to the Washington State Supreme Court. Petitioner's contentions that First Amendment protections provide a defense against the charge of harassment under RCW 18.130.180(22) absent a finding of intent to harass were presented in briefing to the

Washington State Supreme Court. Petitioner's claim that the discipline imposed by the Department violated her rights to due process and equal protection of law were raised within Petitioner's briefing and argument to the Washington State Supreme Court. Appendix J contains materials disclosing constitutional issues raised in appeals to Superior Court and Washington State Supreme Court.

REASONS FOR GRANTING THE WRIT

I. THE WASHINGTON STATE SUPREME COURT'S DECISION AFFECTS IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW AND CONFLICTS WITH THE COURT'S PRIOR DECISIONS

The Department has unconstitutionally applied the Uniform Disciplinary Act retroactively in violation of Heinmiller's right to due process, and erroneously determined that a statement of opinion in an application is grounds for an indefinite suspension of a license. These incorrect rulings adversely affect not only Heinmiller, but potentially thousands of other practitioners from various professions subject to the Act. See RCW 18.130.040. The case raises broad issues relating to what process is due when an administrative agency takes away a person's livelihood.

A. RCW 18.130.180 IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO HEINMILLER

Heinmiller maintains that RCW 18.130.180 is unconstitutionally vague as applied to her because she had no notice in making her 1988 certification that her relationship with M.B. in 1986 violated the Act and that her failure to report it would result in professional discipline. A "statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application" is void for vagueness. Connally v. General Constr. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926). The policies underlying the proscription against vagueness are well-established.

> Vague laws offend several important values. First, . . . we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis,

> with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). "The root of the vagueness doctrine is a rough idea of fairness." Colten v. Kentucky, 407 U.S. 104, 110, 92 S. Ct. 1953, 32 L. Ed. 2d 504 (1972). See U.S. Const. amend. XIV (Due Process Clause).

It is unconstitutionally vague to permit a determination of misrepresentation based on constructive knowledge in the circumstances presented here. Heinmiller did not report her private and intimate relationship with M.B. The Department concluded that Heinmiller was obligated to report that relationship because it determined, years after the occurrence, that the relationship constituted moral turpitude, malpractice and sexual contact with a client, in violation of the Act. However, Heinmiller in making her 1988 certification had no notice that the relationship violated the Act and that her failure to report it would result in professional discipline.

The findings made by the Administrative Law Judge and the Review Judge make clear that the counseling relationship, within the meaning of the Act, terminated before

there was any sexual contact. The Act defines "counseling" as employing any therapeutic technique for a "fee" and the term "counselor" as one who engages in the practice of counseling for a "fee." See RCW 18.19.020(5)-(6). No paid counseling sessions occurred after August 27, 1986.

Before the relationship began Heinmiller and Blair had terminated all formal indicia of any counseling relationship. Their therapy sessions had terminated, and Heinmiller was no longer to collect fees, which is the statutory foundation for being in a counselor relationship. It was reasonable for Heinmiller to believe that she was providing an honest answer to the question posed in her application when she applied for certification as a social worker. She did not have fair notice that her conduct could offend the prohibition against misrepresentation or otherwise violate the Act once it applied to her. In the last counseling sessions M.B. and Heinmiller explicitly discussed resolution and termination of the counseling relationship. Blair felt that she had made substantial progress; the counseling records document that progress; a client may elect to use a short-term counselor rather than devote more time and financial resources to a

long-term relationship with a psychiatrist or other counselor with different training.

It was not common knowledge among social workers or counselors when Heinmiller completed her application that a relationship with someone who had terminated a professional relationship and was believed to be a former client constituted moral turpitude or malpractice or that it indicated an unfitness to practice as a social worker or counselor. There were no published standards or ethical standards in 1986 which disapproved of social workers, counselors or therapists having relationships governing a counselor's relationship with a former client. FF 1.107, 1.110, App. F at 54, 55. No clear standards in 1988 indicated when the counselor-client relationship ended for purposes of the Uniform Disciplinary Act's prohibition against having sexual contact with a client. RCW 18.130.180(24).

The Uniform Disciplinary Act's reporting requirements were unconstitutionally vague. The application question required Heinmiller to make a legal judgment whether any of her conduct in the past ten years violated the Act. There were no written standards to guide her before entering the

relationship, and no definition afterwards to give fair warning that M.B. might be considered a "client" after counseling sessions for fees terminated. The Act could not constitutionally prohibit a "negligent" misrepresentation of a legal opinion. Heinmiller was not fairly on notice that her answer, if later disagreed with by the Department, would result in a finding of misrepresentation.

B. CONSIDERATION OF PRE-ACT CONDUCT WAS UNCONSTITUTIONAL

The Department initially sought to apply the Act retroactively in all respects. The ALJ and the Review Judge made determinations that the Act would not be applied retroactively for misconduct occurring before the date the Act applied to her, but determined that evidence of her conduct before the Act applied to her, could be considered for purposes of the misrepresentation claim since Heinmiller's certification application occurred when the Act applied to her. The Department's consideration of pre-Act conduct to increase the sanction for post-Act "violations" was unconstitutional because it resulted in discipline on past conduct that was not unlawful when committed. The ALJ initially determined that Heinmiller could not be disciplined for alleged misconduct

that occurred before the Uniform Disciplinary Act became applicable to social workers in July 1987, CL 2.15, App. G, relying on Hammack v. Monroe St. Lumber Co., 54 Wn.2d 224, 339 P.2d 684 (1959), (statutory penalty cannot be retroactively imposed for an act which, when committed, was not prohibited). However, the Department concluded that it could consider such alleged misconduct (e.g., Heinmiller's relationship with M.B.) when applying a sanction for post-Act violations. CL 2.37, App. G at 66.

The Department's use of the misrepresentation provision of the Act and consideration of pre-Act conduct to increase sanctions for post-Act violations was unconstitutional. Hammack, supra, is based on federal constitutional precedent. The Constitution forbids the Congress or the states from enacting ex post facto laws. U.S. Const. art. I, § 9, cl. 3; § 10, cl. 1. An ex post facto law inflicts punishment upon a person for an act that was not unlawful when committed. Calder v. Bull, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648 (1798); State v. Edwards, 104 Wn.2d 63, 701 P.2d 508 (1985).

The prohibition against ex post facto laws is not limited to criminal penalties, but extends to laws regulating professionals. Professional license proceedings are "quasi-criminal" and therefore subject to due process and ex post facto requirements. See Medical Disciplinary Bd. v. Johnston, 99 Wn.2d 466, 474, 663 P.2d 457 (1983). The United States Supreme Court has held that a statute that bars a person from pursuing an occupation because of lawful conduct predating the effective date of the statute is an unconstitutional ex post facto law. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 18 L. Ed. 366 (1867); Ex parte Garland, 71 U.S. (4 Wall.) 333, 377, 18 L. Ed. 366 (1866). "[E]xclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct." Garland, 71 U.S. at 377.

Had the discipline imposed by the Department through the Review Judge's order been limited to punishment for the violations determined--that of misrepresentation and of harassment--the issue of retroactive application of law would not be persuasive. However, one can hardly review the final order without discerning that its terms appear to be a reaction to a perception that Heinmiller had "sexual contact with a

client" and engaged in acts of "moral turpitude." The Department used the misrepresentation violation unconstitutionally as a device to punish pre-Act conduct. The Department was precluded from directly charging Heinmiller for alleged pre-Act misconduct. By challenging as a "misrepresentation" Heinmiller's statement that she had not previously violated the Act, the Department litigated the legality of and then with unmistakable clarity punished that prior conduct. The court below affirmed to uphold the Department's aim to bar Heinmiller from "lead[ing] another patient into such a relationship." App. A at 23.

C. BASED ON FIRST AMENDMENT PROTECTIONS HEINMILLER DID NOT VIOLATE RCW 18.130.180(22)

There was no determination by the Department that Heinmiller by her letters intended to threaten or harass M.B. to force her to drop her complaint, in violation of RCW 18.130.180(22). Absent such intent, Heinmiller's letters are protected free speech under the First Amendment and Due Process. See United States v. Gilbert, 813 F.2d 1523, 1529 (9th Cir.) ("requirement of intent to intimidate serves to insulate the statute from unconstitutional application to

protected speech"), cert. denied, 484 U.S. 860 (1987). The Department punished Heinmiller for her speech which is unconstitutional. See, e.g., Bridges v. California, 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192 (1941); Wood v. Georgia, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962); New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); Brandenburg v. Ohio, 395 U.S. 444 (1969); Bose Corp. v. Consumers Union, 466 U.S. 485, 508, 511, 518, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984).

Heinmiller wrote the letters because she loved and was concerned for M.B., not to threaten or intimidate her or to interfere with the proceedings. Both Heinmiller's and the Department's experts testified that the letters were motivated by Heinmiller's sincere love, affection and concern for M.B. App. A at 20-21. These letters show concern, love, frustration and anger; but are not threatening or harassing in a sense that constitutionally may be prohibited by the Act. Heinmiller had a First Amendment right to attempt to persuade M.B and Heinmiller had a right to say that she intended to write a book. M.B. had made her gender preference a matter of public record by bringing suit and later by filing a complaint with the Department. Heinmiller had nothing to expose. Heinmiller

would have the right to publish a book about a matter of public record. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975). The proper remedy for Heinmiller's words are more words, not coercive government action. Whitney v. California, 274 U.S. 357, 375-377, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (Brandeis, J. concurring). Heinmiller's rights under the First Amendment as incorporated in the Due Process clause are violated, absent a finding of intent to harass or threaten M.B. to prevent her testimony in violation of RCW 18.130.180(22). Moreover, there was no finding by the ALJ of any actual interference with the investigation. CL 2.36, App. G at 66.

D. THE DISCIPLINE IMPOSED AGAINST HEINMILLER VIOLATES HER RIGHTS TO DUE PROCESS AND EQUAL PROTECTION

The severe discipline imposed by the Department was arbitrary and capricious and offends due process. After hearing the evidence, the ALJ ordered a three-year suspended sentence of Heinmiller's licenses. App. G at 71-72. CP 274-75. Without explanation or justification, the Review Officer ordered an indefinite suspension of Heinmiller's licenses. App. F at 89. The preconditions imposed by the

Review Officer which Heinmiller must satisfy even before she may request a partial stay or a reinstatement after six years are so extreme that in effect she has been precluded from ever practicing as a counselor or social worker. Under the Order, Heinmiller cannot practice again without a work plan and someone who hires her willing to supervise her efforts after review of the Department's opinion. Even if that were possible, the Order does not require a reinstatement under any circumstance or establish any standard for her to demonstrate entitlement to reinstatement. Instead, it provides unrestrained power to the Department which can prevent her from returning to her profession. The final discipline imposed is unfair and not reasonably related to the violations found in this case. The testimony of professional colleagues of varied disciplines shows that Heinmiller is professionally competent and of good character. RP 801-12, 824, 904-12, 917-23. Heinmiller has been indefinitely deprived of her livelihood and stigmatized as a person guilty of "misrepresentation" and "harrassment."[6]

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[6] The discriminatory harshness of the discipline of Heinmiller is even more pronounced when compared to the modest discipline in Haley v.

Justice Pekelis, who during oral argument described the discipline as "Draconian," and Justices Johnson and Alexander, recognized that something was wrong with the process: Their opinion urges that the misrepresentation provision of the Act should be applied only to those who have knowingly misrepresented information, to "ensure that subsection (2) is not used as a way for the Department to

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Medical Disciplinary Bd., 117 Wn.2d 720, 732, 818 P.2d 1062 (1991). There, a sixty-six-year-old male heterosexual surgeon was found guilty of moral turpitude under the Act for using his position of trust, confidence and authority to facilitate sexual misconduct with a sixteen-year-old, female former patient. Haley hid the relationship from the girl's parents and continued to see her despite her parent's opposition; furnished her with alcohol with the result that she became an alcoholic; kept her out late at night, causing her to drop out of school; and provided her with a house, car and money. Id. at 723-725. The Board suspended Dr. Haley's medical license for ten years, but allowed him to practice medicine subject to the Board's approval. The case of Nghiem v. State, 73 Wash. App. 405, 869 P.2d 1086 (1994), is also revealing. In Nghiem, a male heterosexual doctor was found to have asked inappropriate sexual questions of several female patients and engaged in improper sexual contact, including digital penetration of the vagina. He inappropriately fondled one patient's breast and asked to examine others' "pubic hair pattern." The Board found Nghiem guilty of moral turpitude and abuse of a patient under the Uniform Disciplinary Act, and revoked his license for ten years. Id. at 411. The alleged basis of Heinmiller's discipline is far less egregious than conduct of Haley and Nghiem. Nevertheless, Heinmiller, whose conduct predated the Act and was not in violation of any expressed standards, received a greater penalty.

circumvent its own disciplinary rules, but is instead used as a tool for weeding out dishonest applicants."

Here, there was no procedural safeguard requiring a rational demonstration that the sanction is related to misrepresentation or to harassment. A review of the Order suggests that Heinmiller is being punished based on purported violations of provisions prohibiting acts of "moral turpitude" or "sexual contact with a client" which were not applicable to her at the time of the conduct in question. The Department's interest in adjudicating its administrative claims would not be unduly burdened by requiring that a rational relationship be shown between the administrative sanction and the determination of violation that was made.

There was no determination here that Heinmiller had any actual knowledge that she did anything wrong. While the Court stated that she "reasonably should have known" that M.B. was her "client," Heinmiller, in making her application to be certified as a social worker, had no reason to believe that she had done anything wrong that required reporting her prior relationship with her former client. Under the express terms of the Act, when Heinmiller ceased being a "counselor" for

fees with formal therapy sessions, M.B. was no longer her "client." To apply the "misrepresentation" provisions of the Act, with a Draconian punishment and stigmatizing of Heinmiller as a person who has "misrepresented" (indirectly stigmatizing her for "moral turpitude," "sex with a client" and "malpractice"), did not give Heinmiller fair notice and offends due process and equal protection of law. And the "harrassment" determination offends her First Amendment rights and due process.

II. CONCLUSION

For the reasons stated, the Court should grant the petition for a writ of certiorari.

DATED this 28th day of April, 1996.

Respectfully submitted,

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Attorneys for Petitioner

95-___

In the

Supreme Court of the United States

October Term, 1995

Joan K. Heinmiller,

Petitioner,

v.

Department of Health,

Respondent.

APPENDICES TO WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOAN K. HEINMILLER, Appellant, v. DEPARTMENT OF HEALTH, Respondent.	61901-8 En Banc Filed Oct. 5 1995

DOLLIVER, J,--Appellant Joan Heinmiller (Heinmiller) challenges the Department of Health's decision to indefinitely suspend her social worker license because she engaged in a sexual relationship with a patient. The Department's decision is predicated upon its conclusion that the relationship constitutes unprofessional conduct within the meaning of provisions (1), (2), (22), and (24) of RCW 18.130.180 (Uniform Disciplinary Act).

In 1985, Heinmiller was a social worker and counselor in private practice, who performed counseling services for Valley Cities Mental Health Center under a service contract. In November of that year, Valley Cities assigned Heinmiller a

female patient, Marian Blair (Blair), who had complained of panic attacks. Through counseling, Blair wanted to "sort out" concerns about her parenting skills and her relationships with her mother and boyfriend. Blair began to meet with Heinmiller weekly starting on November 13, 1985.

During her therapy sessions Blair persistently complained that she was unable to forge positive relationships with men. She indicated, however, that she had experienced "unique, warm, intimate, and supportive relationships with women." Finding of fact 1.16. During a session on May 14, 1986, Heinmiller asked Blair if she had ever explored the possibility that she might be a lesbian. Blair responded by indicating that she would not identify herself as a lesbian and that she was not physically attracted to women. However, after the May 14, 1986, session Blair began to develop a romantic interest in Heinmiller. That interest later evolved into a sexual interest. Although she did not inform Heinmiller of these emerging feelings, Blair began to see sexual innuendos in Heinmiller's actions and language during therapy sessions.

During the June 11, 1986, session Heinmiller suggested to Blair that the two become friends after their therapist-patient relationship ended. Subsequently, Blair began to

envision herself in a romantic relationship with Heinmiller. During a session on July 23, 1986, Blair and Heinmiller agreed that the next session would be the final one. They also discussed activities in which the two would participate jointly after the therapy sessions ended and their social relationship began.

Three weeks later, on August 14, 1986, Blair recorded an audio tape in which she detailed the feelings she had developed for Heinmiller over the previous months of therapy. After listening to the tape, Heinmiller noted that she believed it indicated that therapy had helped Blair, who now recognized her as a human being, and not merely a therapist. In response to the tape, Heinmiller wrote Blair the following note, dated August 17, 1986:

> Precious Marian:
> After the sound of your words on my being, I have been subdued and thoughtful-perhaps fuller than I was. I suppose I should be able to live without it - not what for once in my life I have heard someone speak truths that have touched my life with all the richness and rightness I crave - but must I? Will you truly allow me to continue receiving and interacting with your magnificent appreciation of this universe? You cannot possibly know how I marvel at you and your gift to me. I really must

> have you in my life - not to mention need when I consider responsibilities that might lie ahead. Now, as I think it might often be, I quietly anticipate our next meeting.
>
> Joan

Finding of fact 1.45.

Blair's final counseling session took place on August 27, 1986. At that session, Heinmiller expressed her need to have Blair as a friend. The conversation at the session was "exceedingly intimate with sexual overtones . . . ." Finding of fact 1.49. The two agreed to meet socially the next day.

The following day, August 28, 1986, Heinmiller and Blair met at Saltwater State Park. After hours of walking, talking and exchanging intimate thoughts, Heinmiller revealed to Blair that she was a lesbian. Subsequently, Blair disclosed that she was in love with Heinmiller and had physical yearnings for her. Later that day the two became involved physically.

Throughout the following 2-year period they maintained a sexual relationship. Blair eventually began to believe the relationship abusive and ended it in August 1988. Shortly thereafter, she visited the Abused and Battered Lesbian Association where she was told that she had been abused by

Heinmiller. She subsequently returned to therapy with another therapist.

In September 1989, Blair filed a malpractice action against Heinmiller. That suit was eventually settled. Less than 1 year later, in July 1990, she filed a complaint against Heinmiller with the Department of Health (Department). On July 20, 1990, the Department notified Heinmiller about that complaint. Throughout 1990, Heinmiller wrote a number of long letters to Blair suggesting reconciliation. Many of the letters written after July 1990, including those dated August 11, August 27, October 28, and Thanksgiving, contained disparaging statements about Blair's then current therapists and attorneys. Blair felt threatened and frightened by these letters.

On July 19, 1991, the Director for Professional Licensing Services of the Department of Health (Director) filed a statement of charges against Heinmiller. In that pleading, the Director alleged that Heinmiller had engaged in unprofessional conduct pursuant to provisions (1), (2), (4), (22), and (24) of RCW 18.130.180. In February, April, and May 1992, the Department of Health held a hearing before an Administrative Law Judge (ALJ) to determine whether

Heinmiller had in fact engaged in unprofessional conduct as defined by those provisions. On September 25, 1992, the ALJ ruled that Heinmiller had engaged in unprofessional conduct within the meaning of provisions (1), (2), (22), and (24) of RCW 18.130.180, but not provision (4) of that statute. Consequently, the ALJ ordered the suspension of Heinmiller's social worker license for 3 years, and the imposition of a $1,000 fine. That order, however, permitted a stay of the suspension if Heinmiller informed those clinics with which she was associated about her status, did not treat patients with sexual identity problems, and did not violate in any way either RCW 18.130.180 or RCW 18.19, which regulates counselors.

On November 18, 1992, Heinmiller moved to have the ALJ's order reviewed. On that same day, the Director made a similar motion. On March 31, 1993, a Department of Health review judge affirmed the ALJ's ruling that Heinmiller had engaged in unprofessional conduct under provisions (1), (2), (22), and (24) of RCW 18.130.180. That judge, however, modified the ALJ's sanctions. Instead of the previously described 3-year suspension and conditional stay, the review judge ordered an indefinite suspension which only can be stayed if Heinmiller submits to the Department: a detailed

plan of her proposed practice, a current psychological evaluation by a licensed professional approved by the Department's Counselor Program, and a certificate verifying her completion of 30 hours of education on therapist-patient boundary issues. Moreover, the review judge's order also conditions reinstatement of Heinmiller's license upon her completion of 3 consecutive years of satisfactory practice under the supervision of a Counselor Program-approved mental health care professional. Furthermore, the order renders her ineligible for reinstatement until a period of 6 years has elapsed from the date of entry of the order.

On April 27, 1993, Heinmiller appealed the review judge's order to King County Superior Court. That court affirmed the order on May 10, 1994. Subsequently, Heinmiller appealed to this court.

Judicial review of a final administrative decision is governed by the Washington 1988 Administrative Procedure Act (WAPA) (RCW 34.05). "In reviewing administrative action, this court sits in the same position as the superior court, applying the standards of the WAPA directly to the record before the agency." Tapper v. Employment Security Dep't, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). To the

extent that they modify or replace the ALJ's findings of fact and conclusions of law, the review judge's findings and conclusions are relevant on appeal. Tapper, at 406.

An agency's conclusion of law can be modified if "[t]he agency has erroneously interpreted or applied the law". RCW 34.05.570(3) (d). "Under this standard, we accord substantial weight to the agency's interpretation of the law, although we may substitute our judgment for that of the agency." Haley v. Medical Disciplinary Bd., 117 Wn.2d 720, 728, 818 P.2d 1062 (1991); see St. Francis Extended Health Care v. Department of Social & Health Servs., 115 Wn.2d 690, 695, 801 P.2d 212 (1990).

I.

Under provision (2) of RCW 18.130.180, the "[m]isrepresentation or concealment of a material fact in obtaining a license or in reinstatement thereof" constitutes unprofessional conduct. In October 1988, Heinmiller filed an application with the Department of Licensing, requesting certification as a social worker. The application contained the following question:

> WITHIN THE PAST TEN YEARS, HAVE YOU ENGAGED IN ANY OF THE CONDUCT DESCRIBED IN THE UNIFORM

DISCIPLINARY ACT, 18.130.180 RCW, EXCLUDING THE CONDUCT DESCRIBED IN 18.130.180(6) AND 18.130.180(23)?

Finding of fact 1.2. Heinmiller answered this question in the negative. The review judge concluded that in so doing, Heinmiller had misrepresented or concealed, within the meaning of RCW 18.130.180(2), the material fact of her sexual relationship with Blair. The judge concluded as a matter of law that:

> [Heinmiller] knew or should have known that her negative response to the application question was false and that information concerning her counseling and social relationships with M.B. was material to the Counselor Program's determination of her qualifications and fitness to practice counseling and social work.

(Italics ours.) Conclusion of law 2.42.

Heinmiller assigns error to this conclusion of law. First, she asserts that she did not actually know that her sexual relationship with Blair was a material fact that could bear upon the Department's decision to issue her a license. Second, she maintains that even assuming arguendo that she "should have known" the relationship constituted such a material fact, she cannot be found to have misrepresented or concealed that

relationship on her license application because constructive knowledge of a fact's materiality is an insufficient basis for a finding of misrepresentation or concealment within the meaning of RCW 18.130.180(2). We disagree.

Heinmiller draws support for her position primarily from the definitions of "misrepresentation" and "concealment" provided in the dictionary. Admittedly, those definitions suggest that "misrepresentation" and "concealment" presuppose actual knowledge. See Black's Law Dictionary 1001, 289 (6th ed. 1990). Courts are permitted to "resort to dictionaries to ascertain the common meaning of statutory language." Garrison v. State Nursing Bd., 87 Wn.2d 195, 196, 550 P.2d 7 (1976). However, they are not necessarily bound by those definitions.

The goal of the Uniform Disciplinary Act, of which RCW 18.130.180 is a part, is to protect the public from the hazards of health care professional incompetence and misconduct. See RCW 18.130.010. Disciplinary action is the tool provided by the Act for the achievement of this goal. See RCW 18.130.160. Misconduct is not less harmful to the public simply because the professional who engages in it fails to recognize it as such. Therefore, the imposition of discipline

cannot be limited to those situations in which professionals have actual knowledge of the inappropriateness of their actions.

In Tomlinson v. State, 51 Wn. App. 472, 479-80, 754 P.2d 109 (1988), the Court of Appeals sanctioned the disciplinary action of a dentist despite the fact that he was unaware that his conduct was improper. The Tomlinson court upheld an agency's decision to suspend the license of a dentist who inadvertently failed to comply with a regulation requiring such a professional to report the hospitalization of a patient.

Even before the Legislature enacted the Uniform Disciplinary Act in 1984, this court suggested that a professional who behaves improperly is subject to disciplinary action even if that professional was unaware of the impropriety of the conduct. See In re Flynn, 52 Wn.2d 589, 328 P.2d 150 (1958). In Flynn, a dentist unknowingly hired an unlicensed dentist as an employee. The court explained that

> the inadvertent or negligent hiring of a nonlicensed dentist is reprehensible and a proper subject for disciplinary proceedings in order to prevent its repetition by the licensed dentist and to maintain the integrity of the licensing system. . . .

Flynn, at 595-96.

The provisions of RCW 18.130.180 must be interpreted so as to preserve the integrity of the notion that a professional is subject to discipline for misconduct irrespective of that professional's actual knowledge of the impropriety of the conduct. Heinmiller's interpretation of provision (2), however, would function to subvert that notion, thus compromising public safety. Under Heinmiller's narrow construction of the provision, disciplinary action would be permitted only if the professional had actual knowledge at the time the license application was filled out that the conduct omitted from the application was improper. We therefore reject Heinmiller's construction of RCW 18.130.180(2) and hold instead that a professional has misrepresented or concealed material conduct if that professional possesses either actual knowledge or constructive knowledge that the conduct is improper and hence material to a licensing decision.

The Department found that when Heinmiller filled out her license application in October 1988 she had constructive knowledge that her sexual relationship with Blair constituted material conduct bearing upon the Department's decision to

grant her a license. Accordingly, regardless of whether Heinmiller had actual knowledge that the sexual relationship was material, the Department did not improperly conclude that she misrepresented or concealed the relationship on her license application.

II

Under provision (1) of RCW 18.130.180, "[t]he commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession" constitutes unprofessional conduct. The Department concluded that Heinmiller committed an act of moral turpitude within the meaning of this provision by engaging in a sexual relationship with Blair. Heinmiller assigns error to this conclusion of law, claiming that the phrase "moral turpitude" as used in RCW 18.130.180(1) is unconstitutionally vague as applied to her. This argument lacks merit.

In Haley v. Medical Disciplinary Bd., supra, this court was presented with the identical argument on similar facts. We stated that

> the term "moral turpitude", standing alone and unapplied, has a meaning difficult to fathom. Reading RCW 18.130.180(1) as a whole . . .

> we interpret the statute as prohibiting conduct indicating unfitness to practice the profession. . . .

Haley, at 742. Furthermore, noted the Haley court, whether particular conduct renders a professional unfit to practice is determined in light of the purpose of professional discipline and "the common knowledge and understanding of members of the particular profession. . . ." Haley, at 743.

The primary purpose of professional discipline is to protect the public. Haley at 743; see RCW 18.130.010. The public is endangered by a particular social worker if that social worker has engaged in behavior considered to be unacceptable by the reasonable social worker. The critical inquiry in the present case is therefore whether it is the common understanding along social workers that a sexual relationship between a social worker and a former patient, which begins 1 day after the termination of the formal therapist-patient relationship, constitutes unacceptable behavior. Such is a question of fact for the trier of fact. After reviewing the evidence, the trier of fact in the instant case, the Department, answered that question in the affirmative. It noted:

> Dr: Fink testified that the standard of care governing therapists during 1985 and 1986 was

> that a therapist and a client could not have social contact for a minimum of two years after the discontinuance of therapy. . . . [T]estimony at the hearing showed that the 1980 Code Of Ethics of the National Association of Social Workers clearly prohibited sexual activities with clients under all circumstances.

Finding of fact 1.110. In light of this factual finding, the Department did not improperly conclude that Heinmiller's conduct constitutes moral turpitude within the meaning of RCW 18.130.180(1) and renders her unfit to practice social work.

III.

Under provision (24) of RCW 18.130.180, "sexual contact with a client or patient" constitutes unprofessional conduct. The Department concluded that the sexual relationship between Heinmiller and Blair constitutes sexual contact with a patient within the meaning of this provision. Heinmiller assigns error to this conclusion, contending that the sexual relationship at issue is not proscribed by this provision because Blair was a former patient, not a current patient, when the relationship began. We reject this argument in light of the Haley court's explanation of the scope of the provision.

In Haley, a physician began a sexual relationship with a former patient a number of months after the physician-patient relationship terminated. Although the court declined to find sexual contact within the meaning of RCW 18.130.180(24), it expressly stated that

> were Dr. Haley a family physician, a psychiatrist, an internist, an oncologist, or almost any other type of physician who typically has an ongoing relationship with patients, we would conclude--under facts otherwise similar to those before us--that the physician had engaged in sexual contact with a patient.

(Italics ours.) Haley, at 730. A social worker, like a family physician, psychiatrist, internist, or oncologist, is involved in an ongoing relationship with a patient. Therefore, in accordance with Haley, a social worker who begins a sexual relationship with a patient the day after the formal therapist-patient relationship ends falls within the purview of RCW 18.130.180(24).

IV.

Provision (22) of RCW 18.130.180 deems unprofessional conduct any

> [i]nterference with an investigation or disciplinary proceeding by willful misrepresentation of facts before the

> disciplining authority or its authorized representative, or by the use of threats or harassment against any patient or witness to prevent them from providing evidence in a disciplinary proceeding or any other legal action[.]

The Department concluded that Heinmiller sent threatening and harassing letters to Blair in order to discourage her from pursuing her complaint. Heinmiller assigns error to this conclusion of law, claiming that the finding of fact upon which it rests is unsupportable. We disagree. The conclusion is based upon the Department's factual finding that:

> [Heinmiller's] letters to M.B. contain repeated derogatory opinions and statements about M.B.'s therapists, evaluator and attorney and were clearly intended to discredit the advice and opinions of these individuals in M.B.`s mind. Although [Heinmiller] denies that the letters were meant to harass or threaten M.B., the language and tone of the letters themselves reject [Heinmiller's] claims of denial.

Finding of fact 1.100.

A court can reverse an agency finding of fact if the finding "is not supported by evidence that is substantial when viewed in light of the whole record before the court. . . ." RCW 34.05.570(3)(e). "Substantial evidence is 'evidence in

sufficient quantum to persuade a fair-minded person of the truth of the declared premises'." Nghiem v. State, 73 Wn. App. 405, 412, 869 P.2d 1086 (1994) (quoting Olmstead v. Department of Health, 61 Wn. App. 888, 893, 812 P.2d 527 (1991)). Heinmiller argues that the purpose of the letters at issue was not to threaten and harass Blair, but rather to express "love and concern" for her. The facts do not support this contention.

It is undisputed that on July 20, 1990, Heinmiller discovered that Blair had filed a complaint against her with the Department of Health. Less than 1 month later, on August 11, 1990, Heinmiller wrote Blair a letter containing the following passage:

> You can show this to your therapists (I hope you do) and your entire bloodthirsty, scapegoating network. They are free to continue to try to stone me in the streets (which is precisely the same as trying to destroy my career, my financial footing and ongoing relationship to you.) But that stoning will not alter reality or my integrity. It will ultimately shame and demean them. And it will ultimately sicken and devastate you. . . .

Clerk's Papers, at 1400. On October 28, 1990, Heinmiller wrote Blair yet another letter. That letter contained the following passages:

> (Did you know that [the lawyer] and his wife have questionable reputations in the legal community! One attorney--a managing partner of a lawfirm--told me [the lawyer] has a reputation for filing "non-meritorious cases." And a full partner of another lawfirm told me that "everybody knows about [the lawyer] and his wife.")

Clerk's Papers, at 1421-22.

> You are not going to collect money or destroy my reputation because you had a traumatic experience during orgasm nearly two years after termination of great therapy. You are not going to be supported in reinforcing incompetent therapists, and opportunistic "experts" or lawyer. In case you haven't noticed, I have continued to be rather successful at preventing the withholding of defense. How? because I know what I am talking about and I know my rights as well as seeking the assistance of broader resources than "a lawyer."
> I want to tell you something more. I believe this whole thing has gotten so out of hand and is so self-serving on the part of your therapists, "experts" and lawyer that it amounts to CONSPIRACY TO OBSTRUCT JUSTICE AND TO COMMIT FRAUD. I have stated so

> and submitted that opinion to the State of Washington--two separate entities.

Clerk's Papers, at 1425. In her most damning and incriminating letter to Blair, dated Thanksgiving 1990, Heinmiller wrote:

> And when I have been exonerated and your cohorts have been exposed for what they are, I am going to publish a book. I already have considerable content as well as the title--no joke--THERAPIST BASHING: FOR POWER, PROFIT AND CHATHARSIS [sic] by Joan K. Heinmiller MSW, ACSW; an autobiographical account. You want to bet that my effort at discretion regarding our evolving lesbian relationship was only my selfish effort at "swearing you to secrecy?" I wonder how it will feel to all of you to have your lesbianism and/or incestuous ulterior motives publicly scrutinized. I wonder how you will feel as a certified preschool teacher seeking employment after this whole mess is pressed through the legal sieve at your inauguration. I have virtually nothing to lose and everything to gain. I have made peace with myself, what about the rest of you?

Finding of fact 1.98. These letters provide ample evidence to support the Department's factual finding. Two expert witnesses testified at the hearing that Heinmiller wrote the

letters from which these passages derive, out of concern and love for Blair. However, the Department exercised its prerogative as a fact finder not to afford credence to the opinion of these witnesses.

V.

RCW 18.130.160 provides:

> Upon a finding, after hearing, that a license holder or applicant has committed unprofessional conduct or is unable to practice with reasonable skill and safety due to a physical or mental condition, the disciplining authority May issue an order providing for one or any combination of the following:
>
> . . .
>
> (2) Suspension of the license for a fixed or indefinite term;
>
> . . .
>
> (4) Requiring the satisfactory completion of a specific program of remedial education or treatment;
>
> (5) The monitoring of the practice by a supervisor approved by the disciplining authority[.]

A court can reverse an agency order if "[t]he order is arbitrary or capricious." RCW 34.05.570(3)(i). Heinmiller submits that the sanctions imposed upon her by the Department are rendered arbitrary and capricious by their

harshness. Harshness, however, is not the test for arbitrary and capricious action.

> Arbitrary and capricious action has been defined as willful and unreasoning action, without consideration and in disregard of facts and circumstances. Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.

Pierce Cy. Sheriff v. Civil Serv. Comm'n, 98 Wn.2d 690, 695, 658 P.2d 648 (1983) (quoting State v. Rowe, 93 Wn.2d 277, 284, 609 P.2d 1348 (1980)).

> Action taken after giving respondent ample opportunity to be heard, exercised honestly and upon due consideration, even though it may be believed an erroneous decision has been reached, is not arbitrary or capricious.

State Med. Disciplinary Bd. v. Johnston, 99 Wn.2d 467, 483, 663 P.2d 457 (1983) (citing Washington State Employees Ass'n v. Cleary, 86 Wn.2d 124, 542 P.2d 1249 (1975)).

In a recent opinion, Keene v. Board of Accountancy, 77 Wn. App. 849, 894 P.2d 582 (1995), the Court of Appeals was presented with the harshness argument currently before this court. In Keene, the State Board of Accountancy suspended an accountant's license to practice accounting for a

period of 5 years, attaching certain conditions to its reinstatement at the end of that period. The Court of Appeals acknowledged the harshness of the sanctions, but declined to find them arbitrary and capricious because "the action was not taken without due consideration." Keene, at 860.

The review judge imposed the previously described sanctions after a fair hearing at which the facts were considered and Heinmiller had an opportunity to present her arguments. It therefore cannot be said that those sanctions resulted from willful and unreasoning action. Neither can it be said that they are not necessary to protect the public. "In determining what action is appropriate, the disciplining authority must . . . consider what sanctions are necessary to protect . . . the public." RCW 18.130.160. It is not unreasonable to prohibit a therapist who engaged in a sexual relationship with a patient from treating patients until she has demonstrated that she will not in the future lead another patient into such a relationship. This holds true whether the patient is female or male.

Affirmed.

/Dolliver, J./
Dolliver, J.

WE CONCUR:

/Durham, C.J./

/Smith, J./

/Guy, J./

/Madsen, J./

/Talmadge, J./

Heinmiller v. Department of Health
Majority by: Dolliver, J.
Concurrence by: Pekelis, J.

No. 61901-8

PEKELIS, J. (concurring)--I concur in the majority's decision to uphold the Department of Health's (Department) conclusion that Heinmiller violated subsection (22) of the Uniform Disciplinary Act (UDA), by sending threatening and harassing letters to her former client. Heinmiller sent the

letters to M.B. at a time when her professional conduct was governed by the UDA. However, in my opinion, it is extremely problematic to discipline Heinmiller for violating subsection (2) or the UDA for allegedly misrepresenting her past conduct on her licensing application.

The majority opinion suggests that Heinmiller was disciplined because her past conduct violated subsections (1) and (24) of the UDA. This is incorrect. Although the Department concluded that her past conduct violated the terms of the UDA, it specifically found that it could not discipline Heinmiller for that conduct because the UDA did not apply to counselors and social workers at the time the relevant acts were committed. Introduction to Department of Health Review Judge's Conclusion of Law (Dep't C of L), Clerk's Papers (CP) at 9; Dep't C of L 2.55, CP at 68; Introduction to Administrative Law Judge (ALJ) C of L at 2. Rather, the Department based its disciplinary action on Heinmiller's alleged misrepresentation or concealment of a material fact regarding this past conduct. Even the parties agree that the issue before this court is whether to uphold the Department's decision regarding Heinmiller's responses on her licensing application. Appellant Br. at l, Resp't Br. at 1.

In my view, the Department's decision should not be upheld because it erroneously applied a constructive knowledge standard when determining that Heinmiller's failure to disclose her relationship with M.B. constituted a "[m]isrepresentation or concealment of a material fact in obtaining a license. . . ."

RCW 18.130.180(2). When Heinmiller applied for a counselor license and certification as a social worker, she was asked the following question:

> Within the past ten years, have you engaged in any of the conduct described in the Uniform Disciplinary Act, 18.130.180 RCW, excluding the conduct described in 18.130.180(6) and 18.130.180(23)?

Department of Health Review Judge's Findings of Fact (Dep't F of F) 1.2, CP at 10. She responded in the negative. Dep't F of F 1.2, CP at 10. The Department decided that this response constituted a misrepresentation because it was enough that Heinmiller "should have known" that her past conduct constituted an act of "moral turpitude" and "sexual contact with a client" within the meaning of the UDA and thus required disclosure. Dep't C of L 2.42, CP at 64. In my opinion, however, both the plain language of the statute and

the dictates of fair play require that applicants such as Heinmiller have actual knowledge of the falsity of a response before they can be disciplined for misrepresentation.

Absent some ambiguity, courts must give words in a statute their common meaning. E.g., Department of Licensing v. Lax, 125 Wn.2d 818, 822, 888 P.2d 1190 (1995). The majority acknowledges that dictionary definitions of "misrepresentation" and "concealment" suggest that the declarant must have actual knowledge of the material fact in question. See Black's Law Dictionary 1001, 289 (6th ed. 1990). Majority at 9. They also recognize the utility of dictionaries in ascertaining the common meaning of statutory language. See Garrison v. State Nursing Bd., 87 Wn.2d 195, 196, 550 P.2d 7 (1976). Majority at 9. Nevertheless, the majority concludes that, as applied to this statute, the common meaning of "misrepresentation" and "concealment" are unsatisfactory.

The majority struggles to circumvent the plain meaning of "misrepresentation" and "concealment" apparently out of fear that a constructive knowledge standard is necessary to ensure that the public is protected from professional incompetence and misconduct. This fear is misplaced.

There is no question that the Department can refuse to license a social worker whose prior track record demonstrates that she is not fit to practice her profession. RCW 18.19.050(l). However, when this is done not because of the person's past conduct, but based on answers to questions, two basic requirements should be met. First, the questions should be directed to objective facts about which there can be little doubt. It is far better to ask, "Have you ever been arrested or charged with a crime?" than to ask, "Have you ever engaged in an act of moral turpitude?" Well crafted questions would focus an applicant's attention on the specific conduct requiring disclosure and would be more likely to elicit responses which will alert officials to the need for an in depth investigation before granting a license. This would do more to protect the public from unfit professionals than does requiring applicants to reflect on whether their own behavior constitutes an act of "moral turpitude."

Second, to discipline a person not because she knew, but because she should have known that her conduct would be deemed by others to constitute an act of "moral turpitude" makes the Department's action almost Kafkaesque. What constitutes an act of "moral turpitude" is difficult to ascertain

with any precision. Asking an applicant to evaluate her past conduct by such an amorphous concept merely sets a trap which can snare even applicants who attempt to be forthright and honest in their responses. It does nothing to protect the public from unfit applicants.

The inequities created by using a constructive knowledge definition for "misrepresentation" are even more sharply demonstrated by analyzing the Department's determination that Heinmiller "should have known" that M.B. was still her client when they first had sexual contact. There is some evidence to support the Department's finding that the social worker/client relationship continued, but at the same time there is evidence that the relationship had ended. Heinmiller and M.B. mutually agreed to end their professional relationship before they had sexual contact. At that point, all formal indicia of a professional relationship were terminated and never resumed. There were no further appointments or payment for services and Heinmiller and M.B. no longer held themselves out as having a current professional relationship. It is, thus, understandable how, in total good faith, Heinmiller

could answer in the negative when asked whether she had sexual contact with a client.[1]

If the Department wishes to discipline persons who have been issued a license but are later discovered to have engaged in unprofessional conduct, it can promulgate rules to that effect. RCW 18.19.050(l). Disciplining a person under subsection (2) of the UDA, however, should be reserved for those who have knowingly misrepresented information. This would ensure that subsection (2) is not used as a way for the Department to circumvent its own disciplinary rule, but is instead used as a tool for weeding out dishonest applicants.

For the foregoing reasons, I would adhere to the plain meaning of "misrepresentation" or "concealment" and require that applicants have actual knowledge of the falsity of a response before disciplining them under subsection (2) of the UDA.

/Pekelis, J./

/I concur Johnson, J./

/I concur, Alexander, J./

---

[1] A well written question on the application such as, "Have you ever had sexual contact with a client or former client?", would have focused Heinmiller's attention on the type of conduct which required disclosure.

APPENDIX B

THE SUPREME COURT OF WASHINGTON

JOAN K. HEINMILLER, Appellant, v. THE DEPARTMENT OF HEALTH, Respondent.	No. 61901-8 ORDER CHANGING OPINION

It is hereby ordered that the opinion in the above cause. as the same appears at 127 Wn.2d 595, be changed as follows:

1. In the twentieth line from the top of page 604, the following sentence is inserted following "[7]":

> Although Heinmiller's sexual misconduct occurred prior to the application of RCW 18.130.180(1) and (22) to counselors, the Department properly considered whether that conduct would have violated those sections as evidence of a material fact she should have disclosed under RCW 18.130.180(2).

2. The second paragraph of Justice Pekelis's concurring opinion, beginning with the words "The majority" in the eleventh line from the top of page 611, is deleted. The third paragraph of that opinion, beginning with the words "In my view" in the twelfth line from the bottom of page 611, is deleted. The following paragraphs are inserted in their place:

> However, the Department also based its disciplinary action on Heinmiller's alleged misrepresentation or concealment of a material fact regarding this past conduct. In my view, this decision of the Department should not be upheld because it erroneously applied a constructive knowledge standard when determining that Heinmiller's failure to disclose her relationship with M.B. constituted a "[m]isrepresentation or concealment of a material fact in obtaining a license . . . ." RCW 18.130.180(2).
>
> When Heinmiller applied for a counselor license and certification as a social worker, she was asked the following question:
>
> Within the past ten years, have you engaged in any of the conduct described in the Uniform Disciplinary Act, 18.130.180 RCW, excluding the conduct described in 18.130.180(6) and 18.130.180(23)?

Department of Health Review Judge's Findings of Fact (Dep't F of F) 1.2, CP at 10. She responded in the negative. Dep't F of F 1.2, CP at 10. The Department decided that this response constituted a misrepresentation because it was enough that Heinmiller "should have known" that her past conduct constituted an act of "moral turpitude" and "sexual contact with a client" within the meaning of the UDA and thus required disclosure. Dep't C of L 2.42, CP at 64. In my opinion, however, both the plain language of the statute and the dictates of fair play require that applicants such as Heinmiller have *actual* knowledge of the falsity of a response before they can be disciplined for misrepresentation.

Dated this 31st day of January, 1996.

/Durham, C.J.
Chief Justice

APPROVED:

/Guy, J./	/Madsen, J./
/Dolliver, J./	/Alexander, J.
/Smith, J./	/Talmadge, J./
/Johnson, J./	Pekelis, J.P.T./

127 Wn.2d 595

APPENDIX C

THE SUPREME COURT OF WASHINGTON

JOAN K. HEINMILLER, Appellant, v. DEPARTMENT OF HEALTH, Respondent.	NO. 61901-8 ORDER GRANTING MOTION FOR RECONSIDERATION, IN PART, WITHOUT NEW ARGUMENT

The Court having entered an order changing opinion in the above cause on January 31, 1996;

Now, therefore, it is hereby ORDERED:

That further reconsideration is denied.

DATED at Olympia, Washington this 31st day of January, 1996.

/DURHAM, C. J./
CHIEF JUSTICE

127 Wn.2d 595

APPENDIX D

C.J. MERRITT
SUPREME
COURT CLERK

RONALD R.
CARPENTER
DEPUTY CLERK
CHIEF STAFF
ATTORNEY

**THE SUPREME
COURT**
STATE OF
WASHINGTON

[THE SEAL OF
THE STATE OF
WASHINGTON]

TEMPLE OF
JUSTICE
P.O. BOX 40929
OLYMPIA, WA
98504-0929

(360) 357-2077

March 8, 1996

Ms. Joan Heinmiller
P.O. Box 9372
Seattle, WA 98109

Perkins & Coie
Mr. Ronald Gould
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Hon. Christine Gregoire
Attorney General
Ms. Margeret Bichl, Asst.
P.O. Box 40109
Olympia, WA 98504-0109

Re: Supreme Court No. 61901-8 - Joan K. Heinmiller v. Dept. of Health King County No. 93-2-13098-1

Counsel & Ms. Heinmiller:

Counsel's letters dated February 5 and 12, 1996, informing this Court that the Order Changing Opinion should reflect that the application of RCW 18.130.180 should be (24)

and not (22) has been duly noted. The correction will be made to the opinion when it is bound for publication.

Sincerely,

RONALD R.
CARPENTER
Deputy Clerk

LB:lb
N:\DATA\LRBAU\RECNSDER.LTR\61901-8.DOC

APPENDIX E

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

JOAN K. HEINMILLER, Plaintiff, v. DEPARTMENT OF HEALTH, Respondent.	NO. 93-2-10398-1 ORDER AFFIRMING FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

THIS ORDER issues upon an appeal from the Findings of Fact, Conclusions of Law and Final Order of the Washington State Department of Health, issued on March 31, 1993, in the matter of the counselor registration and social worker certification of Joan K. Heinmiller. The Petitioner, Joan K. Heinmiller was represented by and through James E. Lobsenz, Attorney at Law. The Washington State Department of Health was represented by and through Margaret M. Bichl, Assistant Attorney General. The parties presented oral

argument and briefs and the court also reviewed the transcript, exhibits and records of the administrative hearing. The court having duly considered the arguments of counsel and the records and files herein now, hereby, enters the following:

I. CONCLUSIONS OF LAW

1. Heinmiller did violate RCW 18.130.180(2) and (22), and thus was properly subject to disciplinary sanctions for unprofessional conduct. The imposition of sanctions under RCW 18.130.160, which requires that the disciplining authority consider sanctions necessary to protect or compensate the public, make it proper for the Department of Health to consider the material fact which had been concealed during Heinmiller's applications for registration as a counselor and certification as a social worker. The material fact is that Heinmiller engaged in sexual contact with a client in 1986 when she utilized the ongoing counseling relationship to initiate an intimate sexual relationship with a current client.

2. Heinmiller's failure to report this fact on her applications ran afoul of a requirement that an applicant must report any conduct engaged in over the prior ten years which would violate the Uniform Disciplinary Act. Heinmiller

therefore had a duty to describe this fact to the licensing authority so it could determine if registration should be denied or conditionally granted.

3. Heinmiller's violation of (2) deprived the Department of Health of an opportunity to perform its statutory responsibility under both chapter 18.19 RCW and chapter 18.130 RCW to grant or deny licenses based on conditions and criteria established in these chapters.

4. The finding of fact that Heinmiller had sexual contact with Blair in contravention of the prohibition of RCW 18.130.180(24) is fully supported by the record. The Administrative Law Judge and the Review Judge both found that Blair was not a former client for purposes of RCW 18.130.180(24), and those findings are fully supported by substantial evidence and are based on a correct interpretation and application of the law.

5. In Haley v. Medical Disciplinary Board, 117 Wn.2d 720 (1991), the Supreme Court reviewed the Medical Disciplinary Board's conclusion that Dr. Haley had sexual contact with a patient "under such proximity to her

relationship with him as her physician and surgeon that his sexual conduct with her constitutes a violation of RCW 18.130.180(24) as sexual contact with a patient." The court concluded that the facts did not support the conclusion that the young woman was the doctor's patient during the initiation of sexual contact. The court noted that the board never made a factual finding that the doctor-patient relationship existed at the time of the sexual contact, therefore the review was not one of a finding of fact (a clearly erroneous standard) but rather a review of a conclusion of law (de novo standard).

6. Here, the Department of Health did make specific findings that the sexual relationship which began on August 28th, 1986, occurred while Blair was the current client of Heinmiller, who had arranged the date the day before during the final counseling session at Valley Cities. In addition, unlike the situations in Haley and Yero v. Department of Professional Regulation, 481 So.2d 61 (Fla. App. 1st Dist. 1985), where the facts established no behavior suggesting that the doctor used the ongoing physician-patient relationship to induce the patient to engage in sexual activity,

the Department of Health found that Heinmiller had sexualized the last several counseling sessions (which were recorded) and had used the session of August 27th, 1986, to promote "intimate feelings" and "romantic and sexual feelings" on the part of the client in finding of fact 1.58 of the Final Order.

7. The Review Judge erroneously applied or interpreted the law in conclusion of law 2.33 wherein she concludes that verbal conduct can establish sexual contact pursuant to RCW 18.130.180(24). To consider verbal behavior as "sexual contact" would fly in the face of years of interpretation of this phrase in criminal law. For example: State v. R.P., 122 Wn.2d 735 (1993) and In Re Adams, 24 Wn. App. 517 (1979), which interpret RCW 9A.44.010(2) and its predecessor 9A.44.100(2)(a). To interpret "sexual contact" as the Department of Health has done would create significant issues of vagueness and overbreadth for due process purposes.

8. It is appropriate for the Department of Health to consider the sexualized nature of the last counseling sessions. There is no doubt that the counseling sessions in this case

stopped being counseling sessions and began to be more in the area of seduction sessions. The tapes support the finding that the sexual contact which occurred on August 28 was begun in an ongoing counseling relationship, and the counselor used the ongoing counselor-client relationship to help induce and initiate the patient in sexual activity that then began on August 28. These factual findings were fully supported by substantial evidence in the record, and as such, under the standards set forth in Haley, the conclusion of law that Heinmiller had sexual contact with a current, not former, client was a correct application of RCW 18.130.180(24).

9. This determination fully supports the related conclusions that Heinmiller's sexual contact with the client was an act of professional misconduct under RCW 18.130.180(l) and (4). Heinmiller's failure to reveal this circumstance on the application was a misrepresentation or concealment of material facts under RCW 18.130.180(2).

10. The record substantially supports the finding that Heinmiller knowingly misrepresented or concealed material facts. Even for purposes of criminal culpability, a defendant may be punished for "knowingly performing or

failing to perform certain acts under RCW 9A.08.010(1)(b)(ii), where such person "has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense and such information leads the trier of fact to infer that the defendant had actual knowledge of such facts." State v. Shipp, 93 Wn.2d 510 (1980).

11. The record fully supports a determination that either Heinmiller knew or had sufficient information such that she should have known she had an obligation to reveal the sexual relationship with Blair on the applications. This court need not reach the question of whether or not a negligent or reckless misrepresentation could support a violation of RCW 18.130.180(2).

12. The record substantially supports findings of fact 1.94-1.98 and conclusions of law 2.46-2.50 and that such conduct constitutes a violation of RCW 18.130.180(22). Standing alone, the Thanksgiving Day 1990 letter to Blair constitutes sufficient grounds to justify the finding of a violation of RCW 18.130.180(22). Heinmiller's claim that she did not intend to threaten or harass Blair or prevent her from

pursuing her complaint was not deemed credible by the Administrative Review Judge or the Review Judge. Those conclusions are supported by the very language of Exhibit 30 (set forth in findings of fact 1.98 and 1.99) which clearly appears designed to intimidate Blair into dropping her complaint.

13. It was not an arbitrary and capricious decision to find Dr. Fink qualified to give an opinion merely because Dr. Fink was a psychiatrist and not a social worker. The issues in this case are not unique to one branch of mental health therapy, but rather, transcend the field of social work and permit a mental health expert to provide relevant and credible evidence regardless of the particular credential at issue. Such was the finding of the Review Judge and this court finds that the finding was not arbitrary and capricious.

14. Both the Administrative Law Judge and Review Judge used Dr. Fink's testimony in an appropriately very limited way to focus on whether the therapeutic relationship had indeed terminated prior to the initiation of the sexual relationship. The so-called two year standard related by Dr. Fink really had no part in the decisions below.

Heinmiller's own testimony established she was aware that the 1980 Code of Ethics of the National Association Social Workers prohibited a social worker from engaging in sexual activity with a client.

15. The argument about whether or not Dr. Fink should have been allowed to testify is not a crucial one to the findings below or to this court's sustaining of those findings.

16. Unlike the case of Hammack v. Monroe Street Lumber Co., 54 Wn.2d 224 (1959), wherein the court was asked to impose liability for a previous act which the legislature had expressly provided there should be no liability, the actions of Heinmiller in 1986 were never directly or impliedly declared legal and appropriate. Heinmiller's action in 1986 would have fit the elements of a tort action that could be established completely outside the statute: Heinmiller owed a duty to her client; Heinmiller violated that duty by any reasonable standard by initiating an intimate and sexual relationship, which initiation began during the counseling sessions and continued the very next day into actual sexual contact; Heinmiller's actions proximately caused damage to

Blair; and that this damage was a foreseeable result of Heinmiller's breach of duty.

17. Justice Utter said in the Haley case, in disagreeing with the majority's limited approach to RCW 18.130.180(24), that sexual contact of that kind there, and this kind here, "is the evil the statute is designed to prevent". When one can assign a word that strongly, such as "the evil which the statute was designed to prevent," we are not talking about behavior in the context of a prohibition which is legitimate one year and then illegitimate the next year. Heinmiller's conduct is behavior that any reasonable person would have realized was inappropriate, was tortious, and was not at all something that the legislature had either directly or impliedly declared to be legal.

18. The Department must be allowed to weigh the material fact that had been concealed or misrepresented from the Department to be able to distinguish between relatively minor and relatively major violations.

19. There is absolutely no indication that any actions taken by the Department of Health were motivated by

Heinmiller's sexual orientation. The case seemed to have preceded exactly as it would have if the therapist and client were of differing genders. Homosexuality was not shown to be a factor in any action taken by the Department of Health, and this court has no basis to presume otherwise.

20. This court must give deference to the agency decision unless the decision is a manifest abuse of discretion or an arbitrary decision. The Review Judge's sanctions are not arbitrary and capricious and do not manifest an abuse of discretion. Therefore, the sanctions are affirmed.

Based on the foregoing conclusions of law, the Court enters the following:

I. ORDER

The Findings of Fact, Conclusions of Law and Final Order of March 31, 1993 is hereby AFFIRMED.

DONE IN OPEN COURT THIS 10th DAY OF May, 1994.

/Lasnik, Robert S./
Robert S. Lasnik
Judge of the Superior Court

Presented by:

/Bichl, Margaret M./
MARGARET M. BICHL
No. 17976
Assistant Attorney General

Received and Approved as to Form:

JAMES E. LOBSENZ
No. 8787
Attorney for Petitioner Joan K. Heinmiller

APPENDIX F

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF PROFESSIONAL STANDARDS

In the Matter of the Counselor Registration and Social Worker Certification of: JOAN K. HEINMILLER Respondent.	NO. 91-07-24-148 RC FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

Colleen Klein, Review Judge for the Office of Professional Standards of the Department of Health (the Department), having reviewed the pleadings and the record in this case, the Findings of Fact, Conclusions of Law and Initial Order dated September 25, 1992 (Initial Order) issued by Administrative Law Judge James D. Stanford, both parties' petitions for review of the Initial Order and the responses to those petitions, now hereby issues the following:

HISTORY OF THE PROCEEDINGS

Pursuant to notice duly given, an administrative hearing was held before James D. Stanford, duly appointed

administrative law judge, in the Department of Health, Melbourne Tower #314, 1511 Third Avenue, Seattle, Washington on February 18, 19, 20, 21 and 27 and April 3, 1992 and in the Department of Licensing, Greenwood Driver License Examining Station, 320 North 85th Street, Seattle, Washington, on February 22, 1992, April 4 and 18, 1992 and May 6, 1992 in the matter of the disciplinary action of the registration as a counselor and certification as a social worker of Joan K. Heinmiller.

The Counselor Program of the Department of Health (the Counselor Program) was represented by Margaret M Bichl, assistant attorney general. Joan K. Heinmiller (the respondent) was represented by Elaine G. Ducharme, attorney at law.

On June 24, 1991, a statement of charges was issued against the respondent alleging violations of the Counselor Registration Act, chapter 18.19 RCW and the Uniform Disciplinary Act for Health Professions, chapter 18.130 RCW. Upon her receipt of service of the statement of charges, the respondent requested an adjudicative proceeding. The

respondent was duly notified of the time and the place of the hearing.

During prehearing conferences and during the course of the adjudicative proceedings, the administrative law judge entered rulings concerning discovery and jurisdiction and on motions made by the parties. The rulings of the administrative law judge on those matters are endorsed and incorporated herein by reference as memorialized in the prehearing conference orders and in the transcript of the adjudicative proceedings.

At the commencement of the proceedings, the respondent entered a motion to dismiss those charges which related to conduct that occurred prior to the enactment of chapter 18.19 RCW. The Counselor Program opposed the motion. The administrative law judge ruled that the Counselor Program cannot retrospectively impose a penalty on a registrant or licensee for an act which, when committed, had no such consequence. Hammack v. Monroe Street Lumber Co., 54 Wn.2d 224, 339 P.2d 684 (1959).

The Review Judge, having considered the testimony and exhibits admitted as evidence; the pleadings, memoranda, argument and orders filed in this matter; and the petitions for review and responses to those petitions, now enters the following findings of fact:

I. FINDINGS OF FACT

1.1 Between February 3, 1988 and the date of the proceedings, the respondent, Joan Heinmiller, has been registered as a counselor. Between October 17, 1988 and the date of the proceedings, she has also been certified as a social worker. The respondent holds a master's degree in social work from the University of Denver granted in 1974. She was (but no longer is) registered by examination as a social worker in the state of Illinois.

1.2 On or about October 17, 1988 the respondent entered an application for certification as a social worker with the Department of Licensing, predecessor to the Department of Health. Under that section of the application entitled "PERSONAL DATA," the respondent entered a negative answer to the following question:

WITHIN THE PAST TEN YEARS, HAVE YOU ENGAGED IN ANY OF THE CONDUCT DESCRIBED IN THE UNIFORM DISCIPLINARY ACT, 18.130.180 RCW, EXCLUDING THE CONDUCT DESCRIBED IN 18.130.180(6) AND 18.130.180(23)?

1.3 During 1985, the respondent was a social worker and counselor in private practice at Valley Cities Mental Health Center (Valley Cities), Auburn, Washington. She performed counseling services at that facility under a personal service contract which identified her as an independent contractor.

1.4 While at Valley Cities, the respondent provided outpatient mental health services as a family systems therapist in both individual and group settings. Her focus was on short-term problem solving. The respondent did not provide clients with extensive long term psychoanalytic or psycho-dynamic therapy.

1.5 The respondent adopted a therapeutic technique in which she provides support to hold her clients at the level at which they enter therapy. She then works with them to increase their effectiveness in dealing with their issues. As a

therapist she loans her expertise to provide reassurance and guidance to her clients. In providing counseling services, the respondent must overcome any fear of therapy a client has while keeping her expertise in context.

1.6 Clients referred to the respondent by Valley Cities were rated at the beginning and at the end in relation to specific symptomatology. The grading was initially done at the first interview. It was then subject to periodic adjustments during the course of the therapeutic counseling program.

1.7 On or about November 6, 1985, a woman referred to herein as M.B. contacted Valley Cities seeking counseling for panic attacks. In her application for counseling, M.B. identified to the intake personnel that her presenting problem was "panic attacks 1st time in life, feels like she has a lot of business to sort out." M.B. specified that she preferred to have a woman therapist.

1.8 At the time she presented for counseling at Valley Cities, M.B., born August 24, 1943, was in a seven year relationship with a man referred to herein as Tony. She

had two daughters by a prior marriage. These daughters were in the process of emancipating themselves from M.B.'s home.

1.9 The business M.B. wanted to "sort out" through counseling at Valley Cities included concerns about her relationship with her mother, concerns about her mother's health, dissatisfaction with her relationship with Tony, concern about her skills as a parent now that her children were emancipating, unhappiness with her employment as a teacher of preschool children and a general loss of joy in her life. Also, in the summer of 1985, M.B. experienced panic attacks which, according to a medical evaluation, were without any apparent physiological pathology. To M.B., the medical evaluation suggested that the panic attacks were the result of depression associated with changes in her life.

1.10 In November of 1985, Valley Cities assigned the respondent to be the therapeutic counselor of M.B. M.B. was accepted as a client by the respondent. Beginning November 13, 1985, M.B. saw the respondent for counseling sessions on generally a weekly basis, except for vacations and holidays. The counseling sessions continued through August 27, 1986. During these counseling sessions, M.B.'s

characterizations and accounts of various issues were straightforward and descriptive.

1.11 At the initial counseling session on November 13, 1985, the respondent entered a diagnosis that M.B. suffered from a dysthymic disorder (unmet needs), then DMS-II, with depressive neurosis. Dysthymic disorder with depressed functioning requires a therapist to understand what stresses are going on within the client, what is missing, what is different, and how long this has been going on.

1.12 M.B. described long standing depressive symptoms. The depression, which was generally moderate or mild in nature, had lasted at least two years. The diagnosis implied conflict and unmet needs. M.B. did not directly verbalize that sexual orientation was an issue for her during the course of the counseling sessions or at intake.

1.13 During the early counseling sessions, M.B. identified a number of changes in her life which were creating a sense of loss. In addition to family adjustments, she told the respondent about the loss of four close women friends who

had recently moved from the area. The respondent inquired into who was available to provide the support she sought.

1.14 M.B. talked about disappointments, lack of spontaneity, and lack of response from Tony. She expressed a fear that she would never find someone who matched her level of emotionality and need for intimacy. She wanted Tony to understand her sense of pain. The respondent suggested that M.B. not necessarily sleep with Tony if she was feeling upset.

1.15 A subject addressed throughout this therapy was M.B.'s complaint that men did not appreciate her. She felt that men discounted her. They found her over-reactive and inconvenient. These feelings regarding males were formed in her childhood relations with her father, continued through her marriage and were now present in her relationship with Tony.

1.16 Early in the counseling sessions, the respondent questioned M.B. about her relationships with people. After M.B. completed a description of her inability to have rewarding relationships with men, the respondent asked the

question "What about women?" When raising this subject, the respondent noted that, while M.B. complained of an absence of rewarding relationships with men, she had described unique, warm, intimate, and supportive relationships with women. At some point, the respondent considered the possibility that her client was not going to find personal fulfillment with a man in a traditional sense. She directly raised the subject of sexual orientation with M.B. at the May 14, 1986 session.

1.17 During the April 16, 1986 therapy session, M.B. told the respondent that, for the first time in her life, she had had thoughts of suicide. The thought of suicide had crossed her mind as an option and that had impressed her. M.B. did not seem to be distressed or actively suicidal at the time. She was merely identifying that the option had crossed her mind. Because it was not deemed to be a critical situation for her client, the respondent did not make note of the ideation in her report to Valley Cities.

1.18 On April 28, 1986, M.B. subjectively determined that, if she did not feel better by the end of the day, she would commit suicide by throwing herself off a cliff. As

of this time, she had not advised the respondent that she was actually contemplating suicide, only that she considered it as an option. Later in the day, M.B.'s family dog was struck and killed by an automobile. This incident distracted her from attempting suicide.

1.19 During the April 30, 1986 therapy session M.B. again made reference to her suicidal ideation. She felt that her condition was deteriorating rather than improving. She was feeling more and more depressed. M.B. only recalled the respondent stating, "Maybe it's not worth it to endure that much pain." In making this statement, the respondent explains that she meant that therapy can produce the relief being sought.

1.20 Beginning in approximately January, 1986, the respondent told M.B. that she believed her to be "gifted." She defines a gifted person as being one who manifests abilities or strengths in areas that are not common. She found M.B. to be artistic and sensitive in ways that were not common.

1.21 According to the respondent, the concept of giftedness provided her client with an understanding of why

others were not responding as she expected. She considers the concept of giftedness to be a tool for therapy, not a diagnosis. If M.B. had rejected the concept, the respondent claims she would have replaced it with another which focused on negotiating with those causing her pain so that she could gain a more comfortable position in her personal relationships.

1.22 According to the respondent, she uses the concept of giftedness as a qualitative description about a person's experience or potential. A gifted person will often get into trouble because of unique thoughts or behaviors. These unique thoughts and behaviors create discomfort in others and thus are socially troublesome. This is especially true of gifted females who are expected to be submissive to the male. One of the consequences of giftedness is isolation from ordinary people. One remedy is to seek community with other gifted persons.

1.23 In approximately June, 1986 the respondent formed an association of people who were interested in exploring the concept of giftedness for themselves. M.B. attended these meetings. The association was intended to be an educational and informational group, not one involving

therapy. By mutual consent, the participants often discussed personal matters during the meetings. M.B. requested that the association not solicit men to become members as they had a tendency to discount her abilities. Six women joined the group. Initially the association met at the respondent's office, but later moved to her home when her office was re-established there. While a member of this group, the respondent described herself as being gifted.

1.24 M.B. claims she subjectively had difficulty accepting the concept that she was gifted. While there was some hesitation expressed by her during therapy, the credible evidence supports a finding that she eventually relished the concept. Insights about giftedness made during the group meetings were discussed during therapy sessions. M.B.'s reaction was to continually seek reaffirmation of her giftedness status. The respondent provided the affirmations and reaffirmations her client desired. M.B. talked of being excited and relieved when she was told that her giftedness was legitimate. When the respondent asked if she wanted to drop giftedness as a tool, M.B. gave a negative answer. M.B. never rejected the concept of giftedness.

1.25 M.B. considered herself to be a "spiritual" person. During meditation she created mental images of persons to whom she addressed her spiritual questions. She identified these images as "grandmothers" and "spirit helpers." She referred to these entities and their guidance in her private journals. She found it possible to write about her spirituality in her journals, but was extremely reluctant to vocalize her thoughts on the subject. She feared that a therapist might diagnose her spiritual explorations as being indications of a mental disease.

1.26 The respondent acknowledges that she is not an expert in spiritual matters and could not evaluate M.B.'s spiritual process either before or after therapy. During therapy, she told M.B. that she would work with her concepts of spirituality and would support her in all spiritual pursuits which were legitimate to her. If the respondent found she was unable to address spirituality problems due to a lack of expertise, she would refer M.B. to an appropriate person for help.

1.27 In approximately late April or early May of 1986, M.B. told the respondent she feared that if she

expressed her spirituality concerns, others might judge them "crazy." She had recently read an article by a woman who was placed on medication after she had discussed her spirituality with a therapist. The respondent told M.B., "Unconventional experiences can and often do get misinterpreted by mental health professionals." The respondent advised M.B. that she should not raise spiritual revelations in mental health settings, as they could be construed as being signs of mental disease. During this discussion, M.B. told the respondent of her images of grandmothers providing her with guidance. She borrowed the image of grandmothers to provide a forum for addressing her spiritual questions and for assessing pain that she was feeling.

1.28 During the therapy session of May 14, 1986, M.B. was feeling very vulnerable. She describes the feeling as being "like a new born baby." After the first hour of treatment, the respondent suggested that her client remain for an additional hour, as she had a very important subject to bring up. During the subsequent period of time, the respondent inquired as to whether M.B. had ever considered being sexually involved with a woman. Although M.B. had

not raised the question of sexual orientation as an issue, she felt that, as a clinician, she had identified an area of possible stress that should be addressed. She noted that M.B. had repeatedly complained of a lack of being able to connect with men. She further noted that, from her experience, clients are generally not sophisticated in identifying all of the causes of their symptoms. She feels that it was her duty as a therapist to raise this issue to help her client identify or dismiss a potential source of the client's problems.

1.29 The subject of lesbianism was raised by the respondent as a general inquiry. It was not personalized. M.B. felt confused. She already felt as vulnerable as a "new born" during the first hour of therapy and was now exploring a question of her sexual orientation. She acknowledged knowing of lesbianism but did not identify herself as a lesbian. She also acknowledged that she frequently sought emotional responses from women, but had never found herself physically attracted to a woman. The respondent did not identify herself as a lesbian, although M.B. suspected the same.

1.30 Recognizing the possibility of discrimination and M.B.'s denial of any physical feelings for women, the

respondent did not record their discussion of sexual identity in the treatment records forwarded to Valley Cities.

1.31 After the May 14, 1986 discussion about lesbianism, M.B. began to form a romantic interest in the respondent. Her romantic feelings became sexual in nature during July. She was delighted to find that she could feel this way toward another woman. M.B. did not directly verbalize her romantic and sexual feelings to the respondent in the counseling sessions.

1.32 After the question of sexual orientation was raised, M.B. began to sexualize the counseling sessions. She began to find sexual connotations in the words and gestures of the respondent during therapy. M.B. felt that sexual issues were more frequently discussed than during earlier sessions and that the respondent's use of her name had become very personal. M.B. also found the respondent's words to be sensual or sexually suggestive, such as the respondent's frequent use of such words as "dear," "precious," and "beautiful" and her remarks that she liked "therapy, sailing and love making" and "to put her mouth on things." M.B. also considered the positioning of a chair by the respondent as

being seductive. She came to think more about her relationship with the respondent than about her concerns regarding Tony, her parents or her children.

1.33 The respondent acknowledges that she frequently uses words that are capable of multiple interpretations. She testified that she did not intend for any of the words or phrases she used to have a sexual meaning. If her client gave a word or phrase she used an unintended meaning, she was unaware of it as it was not communicated to her. The respondent also acknowledges that she will often position her chair to assist clients in being more comfortable during therapy. No other meaning is intended by her chair's position.

1.34 By the summer of 1986, M.B. had developed significant respect and trust in the respondent's skills. She worked with all of the concepts advanced by the respondent including the one that suggested she may be gifted.

1.35 During the June 11, 1986 counseling session, the general focus was upon M.B.'s acceptance of her giftedness. The respondent found M.B.'s participation in the

gifted group to be wonderful. She told M.B that it was "real powerful" for her that M.B. existed.

1.36 During the June 11, 1986 session, the respondent suggested that she and M.B. could become friends after the counseling sessions ended. In a discussion about this post session friendship, M.B. inquired about the concept of transference (a client's emotional reaction to a therapist wherein a client perceives that the therapist has the attributes of another influential person in the client's life). The respondent dismissed the inquiry and stated that no transference was involved in their situation. The respondent initiated the idea of a social relationship with M.B.

1.37 The respondent explained to M.B. that, as a therapist, she views her clients much like a parent views her child. A client will be guided through a developmental progression and then subsequently break away to become an independent person. She now wanted that independent person (M.B.) to become her friend.

1.38 After the respondent suggested to M.B. that they could be friends, M.B. began to think about their

relationship, first as a good friendship and then as something more than good friends. She saw the respondent as the person who had changed her life from being one in which she felt lost and vulnerable to one in which she felt joy. Her suicidal thoughts had been changed to a desire to be alive. Her relationship with her mother had significantly improved.

1.39 During the July 18, 1986 therapy session, M.B. described her recent trip to Europe with her mother. She noted that she had successfully applied concepts advanced by the respondent during therapy to cope with difficult situations she encountered in her relations with her mother during the trip. She praised the respondent for understanding her problems and providing the techniques to manage them. In response, the respondent went into an extended analysis about her own strengths and weaknesses.

1.40 On July 23, 1986, the twenty-ninth session, termination was first discussed. M.B. stated that she was "tired of this place." The respondent indicated that the sessions offered a certain structure but that maybe they were almost done. The respondent then discussed the dramatic shift that would occur when the sessions ended and a social

relationship began. Later in the session, M.B. stated that part of her was anxious to "get on with it" but that she realized that it wasn't quite time. She did not wish to terminate the sessions while she was feeling dependent and needy.

1.41 Also during the July 23, 1986 session, the respondent questioned how their relationship would be when they finished the sessions. She wanted M.B. to understand her "side of the complexity." M.B. indicated that she felt "scared" about afterwards. On a good day she was "excited" about doing something other than counseling with the respondent but on a bad day she feared that she would be "stupid." In this session, the respondent alluded to transference as it applied to other former clients but dismissed it as not being present in their situation. The respondent formally recorded in her notes that termination was being discussed. The interactions between the respondent and M.B. in this session show the respondent's establishment of a personal and a social relationship with M.B. during the counseling sessions.

1.42 During the July 30, 1986 session, M.B. discussed her seven year relationship with Tony. The respondent remarked that M.B. should consider continuing

that relationship. The respondent and M.B. then agreed that the next therapy session would probably be their last. The respondent inquired as to whether M.B. still wanted to have contact with her after the sessions ended. M.B. immediately responded in the affirmative.

1.43 On or about August 14, 1986, while at her Lopez Island retreat, M.B. dictated a magnetic tape recording (gift tape) which expressed some of her feelings toward the respondent. She delivered the gift tape to the respondent at the conclusion of the next giftedness group meeting. In the gift tape she read a composition entitled BREATHING which she had written a number of years before. Following her reading of this composition, she recorded the following message:

> Joan:
>
> I miss you. I mean, everything's okay with me. I just -- I'll be glad to see you again. I don't know. I'm different. I've changed since I wrote that. I don't know if you'll be able to see the connections. But when I wrote that, I hadn't crossed over yet. I was on the other side and it was a time I was making another approach to the edge, but I didn't make it over. And now, because of your caring and your guidance and

your astounding clarity about what I needed, and your really impeccable sense of timing, you got me to the other side, and now the bigness and the wholeness and the roundness and the mountains, they still take my breath away, but I'm not afraid to go toward them like I used to be. And now it's what I can't get enough of. And you, you're in that. You know, I really don't know anyone like you and it's not the therapist I'm talking about. I mean, I don't think you're just different in degree. In some ways, I think you're different in kind. There is something in you and I don't know what it is, but I want to be around it. You know, I used to look out from my house across this ridge of hills and I'd always get this feeling in my backbone, up and down. I like cello music. I like all kinds of music, but cello music just goes into me all the way down and does things. Any anyway, I used to think about, you know, that moment right before the music starts, that kind of stopped-time moment when the bow is poised over the strings and it seems like you can just feel the anticipation in the bow, and in the waiting, and in the strings. My backbone would get to feeling like a cello bow whenever I look at that ridge and like, I'd think, oh, I just want to fly over those hills. If only I could be lifted and swung through that little arc, you know, the graceful movement of the cellist's wrist and my backbone going over those hills till the music came out. I don't know how you go about trying to fulfill a longing like that, but

I do know now that you don't push it aside and call it nonsense or allow it to be called nonsense. Oh, God, there is a part of me that is just going to be appalled and horrified and shocked and embarrassed after I give this tape to you -- you know that. But that's a part of what I'm trying to do here, is step out and speak out past that interference. So, this is me in the earliest beginnings of trying to practice what you've taught me and there is no way that the words by themselves are enough and my whole discovery of the words to live by was about living the meaning of them. And it seems like living "thank you" has a lot to do with letting in and loving and owning the gift. My new life, Joan, is such a thrill, to keep remembering that it's mine, and to keep owning it and claiming it and naming it and calling it mine. And I want you to know that I'm out here walking around and doing things and many times a day, many, many times a day, I'm aware that this walking and doing and living is a conscious 'thank you' to you. And that is only the beginning. Part of what I'm doing in this month of not seeing you, this going to the desert, and now here on the island and soon to be ocean, is touching the places that are meaningful in my life and stopping to honor this passing and do a kind of saying "good bye" to the things and the times that are falling away, but there is also a real thrill for me in thinking I get to say "hello" to you again.

This message expresses and memorializes some of M.B.'s personal feelings towards the respondent during the time she was seeing the respondent for counseling sessions in July/August of 1986.

1.44 The respondent viewed the gift tape as a validation of her therapy. To the respondent, the gift tape reflected that she had corrected M.B.'s dysthymic disorder and that she was being recognized as a human being, not just as a therapist.

1.45 In response to the gift tape, the respondent sent M.B. the following card:

August 17, 1986

Precious [M.],

After the sound of your words on my being, I have been subdued and thoughtful-perhaps fuller than I was. I suppose I should be able to live without it - not what for once in my life I have heard someone speak truths that have touched my life with all the richness and rightness I crave - but must I? Will you truly allow me to continue receiving and interacting with your magnificent appreciation of this universe?
You cannot possibly know how I marvel at you and your gift to me. I really must have you in my life - not to mention need when I consider responsibilities that might lie ahead. Now, as I think it might often be, I quietly anticipate our next meeting.

Joan

The respondent's message in this card is highly personal and extends beyond the boundaries of a counselor-client relationship. The card's message and tone clearly reflect that the respondent had developed an emotional need and held intimate feelings for M.B. prior to termination of the formal therapy sessions.

1.46 The respondent made no report of either the gift tape or her planned social contact with M.B. to Valley Cities.

1.47 During the final counseling session on August 27, 1986, the respondent expressed gratitude for the receipt of the gift tape and heaped accolades upon M.B. for her insight and her artistic recital. She suggested that the two discuss the gift tape in more detail in a less formal setting. The respondent admits that during this session she was encouraging a relationship but denies that it had any sexual overtones.

1.48 During their final counseling session, the respondent talked of her concerns about a close friend who had recently been diagnosed with breast cancer. She asked if it was O.K. that she had a need and stated that if she could spend some time with M.B. it would be wonderful. In this context, the respondent later remarked that she had a "need" for a very close friend that very few people could satisfy. The respondent stated that she needed a friend tomorrow, that she was "ready to embark" and that M.B. was an excellent candidate for a wonderful friend. The respondent's interactions with M.B. in this session demonstrate that her

pursuit of a personal relationship with M.B. was motivated by her own personal needs.

1.49 During a conversation near the end of the final therapy session, the respondent remarked that, if their subsequent relationship didn't work out, she had more to lose than M.B. She alluded to the special recognition that M.B. had given her with the gift tape. Later in the session, M.B. stated, "How often do I get to see you and how much of you do I get to have?" The respondent responded, "You see, I wonder about how much you will want." M.B. answered, "I want all I can get. . ." After observing that delays could result in a relationship never being formed, the respondent stated, "Lets start tomorrow." The exchanges during this therapeutic session were exceedingly intimate with sexual overtones that ultimately led to physical sexual activity the following day.

1.50 At the end of the last counseling session and after carefully planning their first social engagement for the next day, the respondent questioned if they really wanted to meet. M.B. immediately responded, "I sure do" and added that it would really "freak" her out if the respondent changed her mind at that point. This interaction is not only indicative

of the intensity of M.B.'s feelings for and her dependency on the respondent but also of the control and influence that the respondent had over M.B.

1.51 It is clear from their conversation during the final therapy session that the parties were attempting to ascertain the depth and scope of their future relationship. This was not a casual conversation relating to an occasional meeting for "tea." It was an intimate conversation prefatory to an intimate sexual relationship. Assertions to the contrary by the respondent constitute denial of that which is readily apparent to even the most inexperienced listener and will not be credited. The respondent, in her position as a counselor, facilitated and established a personal, social and/or intimate relationship with M.B. during their counseling sessions.

1.52 The respondent defines termination as being a dynamic process that varies for each client according to the client's needs. Since counseling often entails a tapering of negative symptomatology, termination is not a matter of precise schedule. She looks to see if the client is more connected and able to cope with the issues presented. As a therapist she must consider the client's fear of breaking the

therapeutic bond, the possibility of relapse and any need for intensive follow-up care.

1.53 The respondent concluded that except for the issues concerning her relationship with Tony, M.B. had resolved all of the issues she presented when she first sought therapy. In her view, all of her client's presenting issues and symptoms had either diminished or no longer existed. The Respondent believed M.B. was ready for termination by the end of July 1986.

1.54 M.B. did not feel that the issues for which she initially sought therapy had been resolved. M.B. testified that although she was apprehensive about terminating the therapy sessions, she stopped the sessions because she knew she was not going to "be finished" with her therapist. The tapes of the therapy sessions indicate the respondent's interest in moving forward with the social relationship. The respondent's focus was not on M.B. but on herself and their forthcoming relationship.

1.55 The tapes of the last therapy sessions also reveal only minimal discussion of termination issues during the

sessions. When termination was discussed by the respondent, it was often accompanied by a lengthy discussion of their subsequent friendship and personal relationship.

1.56 M.B. testified that at that time she had the impression that if she needed additional counseling from the respondent it could be arranged. Although the respondent had indicated that they could not go back to "formality" once the sessions ended, the respondent also indicated that she held back a little energy for clients who needed counseling after their sessions had ended. A review of the taped sessions reveals that the respondent's communications to M.B. about termination and about their ability to resume counseling after their counseling sessions ended were ambiguous and confusing. Given the respondent's contradictory messages, M.B.'s belief that she could resume counseling with the respondent was reasonable.

1.57 The respondent claims, "I never felt sexual towards M.B. during treatment. I never even perceived her as attractive. I did not initiate any conversation or pursue a therapeutic line from the standpoint of meeting my curiosity, my needs, my interests. I did not have such feelings towards

her, and I had no clue that she had feelings of that nature toward me." The respondent thought M.B. only wanted to get together to visit and to see if they had interests in common that they might want to share. The respondent asserts "There were no warning signals of another agenda, some kind of influence." She claims that there was no display of euphoria which would be a warning signal to a therapist that the termination request was for reasons other than the completion of therapy. The magnetic tapes of the final therapy sessions contradict this analysis.

1.58 The exchanges between the respondent and M.B. in their final therapy sessions together with the gift tape put, or with reasonable inquiry, should have put the respondent on notice that her client had intimate feelings toward her. The assertion by the respondent that she had no inkling of M.B.'s romantic interest in her simply defies credibility. Since their only contact, other than at the giftedness group meetings, was during therapy sessions, it is evident that the romantic and sexual feelings of M.B. matured during these sessions.

1.59 The respondent acknowledged that she understood that a therapist's relationship with a client is usually in an unreal world where the therapist gives the client her undivided attention without interjecting her personal needs into that relationship. Clients often desire this individual attention and want it to continue in a social setting. The respondent understands that when this occurs, it is an element of transference. Notwithstanding this knowledge of transference, the respondent dismissed it as not being present in her therapy with M.B. She conducted no direct examination of her client to clinically ascertain its presence or absence. She did not consider and/or recognize its effect when starting the social relationship.

1.60 The respondent was aware that touch was terribly important to her client because M.B. had repeatedly emphasized the need for touch. Therefore, the respondent believed that it would be very important for M.B. to have a rapport with someone with whom she wishes to be sexual.

1.61 On August 28, 1986, the day after their last scheduled therapy session, at approximately 3:30 p.m., M.B. and the respondent met at Saltwater State Park in South King

County. The couple spent many hours at the park talking, walking and exchanging intimate thoughts. During the course of their conversations at dinner near the park, the respondent disclosed that she was a lesbian. She also explained that she had been living with another woman, Rosemary. M.B., in a tearful and emotional encounter, told the respondent that she was in love with her and had physical feelings for her. The respondent claims to have been totally shocked and astounded by this revelation. After their meal they returned to the park where their interchange became physically sexual in nature. At the time the physical sexual relationship commenced, M.B. remained the respondent's client. The encounter continued until 4:30 a.m. the next morning.

1.62 Between August 28, 1986 and approximately August 3, 1988, M.B. and the respondent maintained an active sexual relationship. The respondent became enamored with M.B. She copied her clinical notes taken during therapy because they were so important to her. During this two-year relationship, they learned a significantly greater amount about each other than they ever had during the therapeutic sessions.

1.63 M.B. pursued her spirituality by joining a group that identified itself as "Medicine Wheel." Medicine Wheel is founded upon rituals derived from native American cultures. It has a nurturing program which involves only females. The respondent asserts that throughout the relationship, she supported M.B.'s involvement with Medicine Wheel emphatically and felt it was extremely beneficial to M.B.

1.64 During their approximately two year relationship that followed the counseling sessions, the respondent and M.B. continued in their sexual relationship and shared many experiences which became relevant to later action by M.B. The couple frequently went to M.B.'s tiny trailer on Lopez Island. In 1987, M.B. separated from Tony and moved into a cabin in Black Diamond. The cabin contained a loft which was entered only from a ladder. The respondent would spend one or two nights a week with M.B. at her Black Diamond cabin.

1.65 Throughout their relationship, M.B. exchanged numerous pieces of correspondence with the respondent, especially when she was on vacation. The cards and letters contained expressions of love and devotion.

1.66 The respondent remained attached to her former partner, Rosemary. She explains that she would not deny Rosemary a position in the relationship, given their long-term relationship. She and M.B. also associated freely with members of the gay community and attended gay rallies. At one point during the relationship, M.B., unknown to the respondent, had sexual contacts with another female.

1.67 Early in their relationship, the respondent described to M.B. a physical confrontation she had had with Rosemary while they were living in Alaska. After that confrontation she and Rosemary adopted a "safe word" to be applied when matters became too intense for one of the them to continue. When the word was spoken all activity would promptly cease. She suggested that she and M.B. now incorporate the safe word concept into their relationship. The word proposed by the respondent and accepted by M.B. was "asparagus."

1.68 M.B. later came to believe that the respondent introduced the "safe word" as a way to lead to a sadomasochistic relationship. Her belief was based upon her perception of the respondent expressing support for lesbians

with pierced nipples, having a sadomasochistic photo and stating that she liked steel tipped shoes. She also believed that a photograph of the respondent with a holstered pistol taken on a camping trip in Alaska years before displayed sadomasochistic tendencies.

1.69 From M.B.'s prospective, her relationship with the respondent was an endless marathon of being harangued by the respondent. She became fearful of the respondent due to the yelling and haranguing. When she attempted to respond, the respondent became louder and more insistent. This would cause her to fall into fits of crying and pleas to stop. The respondent would then become conciliatory and give expressions of love.

1.70 M.B. believes that the respondent ordered her to leave Tony, asserted her father had abused her as a child and told her that she was not able to figure out her life because she was learning disabled.

1.71 As the relationship progressed, M.B. came to identify many events as being abusive. She acknowledges that they appear very minor when observed in isolation. However,

in her mind they became abusive when taken together. Her incidents of abuse included the following examples:

(a) The respondent had pressured her to purchase food at a grocery store while they were at the Lopez Island retreat;

(b) The respondent had requested that she kill a fly;

(c) The respondent had purchased a ring for Rosemary her former partner;

(d) The respondent had operated a vehicle in an aggressive manner; and

(e) The respondent had been verbally abusive to her on many occasions.

1.72 M.B. also felt that comments made by the respondent during their relationship were abusive including the following:

(a) "Are you ever going to have fun?"

(b) "I might make a scene."

(c) "Get the gun." (A phrase used in a flippant manner when minor irritations were raised).

(d) "If things get worse, well we can both jump off a bridge."

1.73 M.B. maintains that at one time in the Black Diamond cabin the respondent came at her with her hands extended as though she were going to choke her while yelling and screaming. M.B. recalls sitting on a mattress in the loft when the respondent came up the stairs in a threatening manner but no physical contact was made. M.B. acknowledges that no violent physical contact resulted from this incident.

1.74 The respondent denies that she ever approached M.B. in a threatening manner. She acknowledges that while climbing up the ladder it was necessary for her to extend her body over the end of the ladder to reach the mattress upon which the couple slept. She feels that the interpretation of her movements as being threatening by M.B. is the result of the Iskower phenomenon, a concept of an individual waking to see a body hovering over her and interpreting that hovering as being threatening. The respondent asserts that at no time did she make any gestures towards M.B. which would simulate choking or approach her in a menacing manner. The respondent denies any violence or intention of violence at any time during the relationship.

1.75 The respondent does not recall ever being advised by M.B. that her driving was in a manner that was frightening. She never intended to drive her vehicle in a manner that would be frightening. She observed that M.B. often gets very frightened of driving under any circumstances. She never drives more than forty-five miles per hour when on the freeway.

1.76 The respondent acknowledges many conversations with M.B. over a number of subjects but denies that she ever intended to be domineering. She recalls very, very few arguments with M.B. during their relationship. She acknowledges that she has a tendency to explain a position she is taking in detail and to frequently repeat things. From her perspective most of the conflicts that occurred during the relationship she had with M.B. were in response to accusations made by M.B. She acknowledges that she was assertive, but claims that M.B. was also assertive.

1.77 The respondent recalls that when arriving at M.B.'s cabin one day in 1988, she was accused of deliberately waiting or staying at work in order to be late. When she would discuss instances that occurred at work, she would be

challenged as to what she was saying and what meaning this was to have to M.B. Frequently, the respondent's comments were nothing but a casual comment about what happened at work. These constant challenges created a sense of frustration in the respondent because she considered the allegations to be unjustifiable.

1.78 The respondent recalls an argument in April 1988 when she explained to M.B. that she felt an attraction to a client. When M.B. inquired as to why she did not act on those feelings, the respondent became furious and yelled at her. The respondent wanted M.B. to understand that she was the sole focus of her feelings of love. She had even proposed marriage to M.B.

1.79 M.B. testified that there was little change in their relationship after the therapy sessions ended. During their sexual relationship, the respondent consistently offered analysis and provided direction to M.B. regarding the very issues for which she had sought counseling in the first place. The respondent's claims to the contrary are not supported by the evidence. M.B. remained dependent on the skills of the respondent for a substantial period of time after the therapy

sessions ended. M.B. believed that the respondent continued to do therapy and she continued to respect the respondent's expertise and trust her as a therapist.

1.80 A review of the evidence admitted at hearing shows that the counselor-client relationship did not terminate with the last counseling session but was ongoing. The respondent continued as M.B.'s counselor and therapist while they were involved in a social and sexual relationship.

1.81 In approximately summer of 1988, M.B. began to accuse the respondent of treating her like a stranger. The respondent had no idea what M.B. was speaking about. In late June or early July, she and M.B. explored their relationship in detail. The respondent stayed at the cabin four consecutive nights but did not promote any physical contact sensing that something was seriously wrong. The respondent subjectively determined that M.B. may be having a crisis with her sexuality. Later, M.B. told the respondent that their relationship was over. The respondent offered to make concessions to keep the relationship going.

1.82 M.B.'s statement that the relationship was over created shock and confusion in the respondent. M.B. refused to tell the respondent what had happened to end the relationship or why it had happened. She did not respond to the respondent's request that they enter therapy together.

1.83 Their final evening together was on August 3, 1988. M.B. testified that she has no recall of the night. The respondent testified that their only physical contact was when the respondent put her arm over the waist of M.B. The next morning, M.B. arose early and confronted the respondent with allegations that the respondent had terminated therapy too early in order to pursue a relationship with her.

1.84 M.B. testified that her relationship with the respondent was destructive to her and destroyed her self esteem.

1.85 Shortly thereafter, M.B. went to the Abused and Battered Lesbian Association (ABLA) where she was told she was an abused lesbian. When she appeared at ABLA for the first time, M.B. was extremely distraught. She cried through most of the initial interview. She accused the respondent of

hours and hours of yelling and screaming, isolating her from her family and friends, humiliating her in public and making threats. In an ABLA questionnaire she recorded that there was no violence during the relationship, that she had never experienced abuse as a child or an adult, and that she was unsure as to whether she had ever experienced any sexual abuse.

1.86 When M.B. initially contacted ABLA, she met with Deborah Rutt, MSW, who told her that she had been abused by the respondent. Ms. Rutt remarked "It is never okay for a therapist to be involved with a client." This statement provided confirmation to M.B. that she had been seduced and abused by the respondent. She was also told by another therapist, Laura Brown, Ph.D., that the respondent had terminated therapy prematurely. M.B. is now firmly convinced that all of the respondent's therapeutic techniques, including the concept of giftedness, were designed to isolate her for seduction.

1.87 M.B. has returned to therapy. She continues to receive therapy as of the date of the proceedings.

1.88 On or about November 29, 1988, M.B. directed a letter to the respondent which stated as follows:

> I'm beginning to learn something about boundaries. Many, many things are happening inside me. Many feelings. I am not ready to talk with you about it. It's time for me to be quiet with it all. It's winter now. It's time to rest. The trees are showing me how to stop, how to drop off all the stuff & be still, how to be rooted and bare.
>
> I'm writing to say please don't call me anymore, at home or at work. Please don't come to my house or work to leave things or letters. If you want to communicate with me please do it through the mail. Please respect these boundaries, & don't ask me to defend, justify or explain them. Mostly I don't know what lies ahead. At this point I'm not making any major decisions about contact or no contact. In the future for the next few months I am going to be quiet. You won't be hearing from me. (Maybe you remember what you said to your family when you went to Europe) I wish you well.
>
> I wish you the deep peace of wintertime. Take care.

Except for the personal delivery of a package to M.B.'s home during her absence, the respondent has complied with the directions in this letter.

1.89 In approximately late February or early March, 1989, M.B. contacted the respondent in the parking lot at the Rainier School. The respondent's initial response to M.B.'s presence in the parking lot was that she was there to discuss reconciliation. The respondent describes her emotional condition as being so shaken that she could not stand up. She went to M.B.'s car and sat on the hood. M.B. screamed at her to get off of the hood, opened her car door and threw out a bunch of personal items that the respondent had left at the cabin. The respondent was too distraught to respond to this activity. M.B. then handed the respondent a letter.

1.90 In the letter delivered during the parking lot encounter, M.B. demanded that the respondent (1) tell everyone what she had done, (2) tell her employer, (3) stop seeing people who were vulnerable to the power of her voice, (4) stop contacting her family or herself, (5) enter anger management therapy, and (6) return all photographs. The respondent responded to these demands by continuing her written correspondence with M.B.

1.91 On or about September 22, 1989, M.B. initiated a law suit against the respondent. That lawsuit is no longer pending.

1.92 On July 20, 1990, Lloyd Goodin, investigator for the Department of Health, advised the respondent that M.B. had filed a complaint against her with the Department. Investigator Goodin was unable to discuss M.B.'s complaint with the respondent in-person because the respondent's focus was on discussing the complaints that she had filed with the Department against M.B.'s then current therapists.

1.93 During 1990, the respondent wrote numerous letters to M.B. attempting to reconcile. Some of her letters which were written after the respondent's knowledge that M.B. had filed a complaint against her with the Department contained statements that attempted to discredit the counselors who were currently treating M.B.

1.94 The respondent sent M.B. an eight page single spaced typed letter dated August 11, 1990 that included the following excerpts at pages one and three:

> . . . . Neither is reasonable but of course, your lawyer, "therapists" (that includes Deborah Rutt

> and Karen Merriam) and experts don't give a damn about your truth or real distress. They are only in it to cover their incompetence and of course greed/power. That is why they still don't bother with routine professional protocols and ethics. They have no investment whatsoever in reality or your long-term well-being. And it is clear they "get off" on ugliness toward me.
>
> Of course, I continue to believe that an enormous part of the pain and distress you have experienced is a direct result of the incompetence of your current "therapist"-- Janice Pickard, your former "recruiter" -- Deborah Rutt, the advocate of "victimized" lesbians, battered or not, and finally -- Karen Merriam, your group cohort who decided to extend "trauma health services" to you -- for a fee. What boundaries; what hustlers. . .

1.95 The respondent sent M.B. a ten page single spaced letter dated August 27, 1990. An excerpt from page 10 of that letter is as follows:

> . . . . I am sorry [M.]. I tried so hard to give you a gentle alternative. I will close now. It may be for the last time. I do not know if there will be anything else to say after Friday. . .
>
> Goodbye [M.]. I love you and I am going to miss you. I think it's almost completely out of my hands now. It's up to you. I have not given

> up. I still feel exactly like I did in the photo New Year's Eve day, 1987. . .

1.96 The respondent sent M.B. a six page single spaced typed letter dated October 7, 1990 which included the following excerpt at page 6:

> . . . Because you have made some catastrophic decisions based on that presumption. You have made grievous error. Regretably, [sic] the Arbitrator was distracted by all the "noise" from your resources and your sensational accusations of abuse so as to not have noticed that there never was abuse. And competent/principled therapists would have sought understanding not exploitation of the therapy you received. . .

1.97 The respondent sent M.B. a nine page single spaced typed letter dated October 28, 1990 that included the following excerpts at pages 2, 4 and 6:

> Either you weren't so distraught (and she's lying) or you were (and she was negligent). It's that simple and I am following through with full review of her conduct. I initiated complaint against her on behalf of myself and on behalf of you -- since her misconduct has been so central to your incredible escalating distress, confusion and the development of extremely serious symptoms and actions. (Remember her deposition where she said you were worse

> now--May 1990--than some 4 years ago?--another indication of misdiagnosis and mistreatment.). . .
>
> . . . What I am trying to help you see [M.] is that the people you have been relying on totally lack the credentials and skills to have helped you discover what had happened. And because of their negligence and now self-serving defense, you are not being given appropriate support and help. . .
>
> . . . [M.], I don't care how embarrassed you might be over all of this and I certainly don't give a damn about your lawyer and therapist's self-serving maneuvers, I will not drop this matter. Additionally, I will tell you that Karen Merriam and co-leader(s) will be subpenaed [sic] along with ALL NECESSARY PERSONS to establish the truth of this circumstance. . .

1.98 The respondent directed a seven page single spaced typed letter dated Thanksgiving 1990 to M.B. which contained the following paragraph at page two (2):

> And when I have been exonerated and your cohorts have been exposed for what they are, I am going to publish a book. I already have considerable content as well as the title--no joke--THERAPIST BASHING: FOR POWER, PROFIT AND CHATHARSIS [sic] by Joan K. Heinmiller MSW, ACSW; an

> autobiographical account. You want to bet that my effort at discretion regarding our evolving lesbian relationship was only my selfish effort at "swearing you to secrecy?" I wonder how it will feel to all of you to have your lesbianism and/or incestuous ulterior motives publicly scrutinized. I wonder how you will feel as a certified preschool teacher seeking employment after this whole mess is pressed through the legal sieve at your inauguration. I have virtually nothing to lose and everything to gain. I have made peace with myself, what about the rest of you?

1.99 M.B. testified that she felt threatened and frightened by the respondent's letters to her.

1.100 The respondent's letters to M.B. contain repeated derogatory opinions and statements about M.B.'s therapists, evaluator and attorney and were clearly intended to discredit the advice and opinions of these individuals in M.B.'s mind. Although the respondent denies that the letters were meant to harass or threaten M.B., the language and tone of the letters themselves reject the respondent's claims of denial.

1.101 M.B. testified that the Respondent never stopped telling her what was good for her even after their relationship ended in August 1988.

1.102 On or about January 25, 1991, the Counselor Program requested that the respondent submit to a psychological evaluation to determine if she could continue practicing counseling and social work with reasonable safety to the consuming public. She was given the name of two mental health practitioners and told that she could choose one to do the psychological testing. After the respondent complained about the choice of practitioners, the Counselor Program withdrew its request for the evaluation.

1.103 The respondent feels that she has not violated any code, any ethic or any standard in her relations with M.B. She considers their relationship completely private and the inquiry into its propriety as being intrusive. She perceives that people are intruding and drawing conclusions that are unrealistic. This has been devastating to her.

1.104 Because of M.B.'s complaints against her, the respondent has analyzed entries in the private journals and other writings of M.B. Based upon her analysis of these writings, the accusations of abuse and the initiation of legal actions by M.B., the respondent states that she believes that M.B. suffers from paranoid schizophrenia. The respondent

considers it her duty to call this analysis to the attention of both the Department and M.B.'s present therapist. She has insisted that M.B. be referred to a psychiatrist for a formal psychiatric evaluation.

1.105 In April 1990, the respondent filed complaints against all therapists currently treating M.B. and against those individuals with whom M.B. had come in contact at ABLA. The respondent has submitted volumes of correspondence to the Department advocating for a psychiatric evaluation of M.B. and severely criticizing the motives and the treatment provided by M.B.'s current therapists.

1.106 Between September 1988 and the date of these proceedings, the respondent has been receiving treatment primarily associated with her attention deficit disorder from Ralph L. Bass, M.D., a psychiatrist in private practice. Dr. Bass' opinion was that the respondent is not mentally ill, does not currently pose a risk to the public and will not likely pose a risk in the future. In his opinion, there is absolutely no likelihood that the circumstances which led to the relationship between the respondent and M.B. will be repeated. Dr. Bass believes that the respondent has learned from this experience

and has the capacity to modify and conform her behavior to the present requirements of law. Dr. Bass further believes that the respondent has a firm conviction that M.B. suffers from a psychosis which is being ignored. It is this firm conviction that is causing her to advocate for M.B., not an effort to distract attention from herself.

1.107 Dr. Ralph L. Bass knows of no ethical standards in place in 1986 which disapproved of social workers, counselors or therapists having relationships with either present or former clients. However, in his opinion, sexual or romantic relations within therapy are inappropriate and sexual relations between a therapist and a client are damaging to the client.

1.108 Dr. Bass' opinion was based on the respondent's statements to him, his observation of the respondent during their therapy sessions, and his review of written materials provided by the respondent including excerpts from M.B.'s journal, some of her letters to M.B. and the Valley Cities treatment records for M.B. Dr. Bass had not reviewed the tapes of the last therapy sessions nor the respondent's treatment records for M.B. Dr. Bass also testified that the

respondent had discussed with him that a social or sexual relationship had not been planned by the respondent and M.B.

1.109 Robert I. Fink, M.D., has been a supervisor of social workers and an adjunct faculty member in the Department of Social Work at the University of Washington. The Administrative Law Judge found that by his close association with counselors and social workers, Dr. Fink is qualified to testify concerning the issues in this case.

1.110 Dr. Fink testified that the standard of care governing therapists during 1985 and 1986 was that a therapist and a client could not have social contact for a minimum of two years after the discontinuation of therapy. This two year standard is not found in any code of ethics published during that time by professional organizations for either counselors or social workers and research material indicates that the question of when a sexual relationship with a former client may be initiated is still open to question in some jurisdictions. However, testimony at the hearing showed that the 1980 Code Of Ethics of the National Association of Social Workers clearly prohibited sexual activities with clients under all circumstances.

1.111 Dr. Fink identified that neither therapy nor the therapist-to-client relationship terminates with the final counseling session. After listening to magnetic tapes of five of the last six therapy sessions between the respondent and M.B., Dr. Fink determined that issues raised by M.B. in those sessions were avoided by the respondent because the relationship was going to continue after the sessions ended. Dr. Fink believed that statements made by the respondent, including the statement that she would hold back a few bits of energy after termination to resolve issues that may linger, meant that therapy never effectively terminated. Dr. Fink also testified that the issue of termination was avoided by the Respondent in these counseling sessions. In his opinion, the social relationship merely took the place of therapy. Dr. Fink's opinion is that the counselor-client relationship continued until August of 1988 or even thereafter. This testimony and opinion is credible.

1.112 Dr. Fink testified that certain boundaries exist in a counselor-client relationship and that these boundaries are very important to a therapeutic relationship. The counselor must give up talking about his or her own issues in therapy

with the client. Dr. Fink stated that in his review of the five taped therapy sessions, he was overwhelmed by the social nature of the sessions and information that the respondent provided about herself in those sessions. The respondent would often shift the focus of the sessions to her own life and issues. Dr. Fink testified that there was confusion as to who was the therapist and who was the patient. The boundaries were obscured.

1.113 Dr. Fink also testified that after listening to the five taped therapy sessions, it was clear to him that the respondent had strong feelings for M.B. He did not know if the respondent recognized those feelings.

1.114 In analyzing the respondent's letters to the department, Dr. Fink testified that the respondent was confused as to her relationship and role with M.B. She is both a former therapist and a former lover. She represented herself s M.B.'s caretaker.

1.115 In analyzing the respondent's letters to M.B., Dr. Fink testified that their basic tone implied that the respondent was still deeply in love with M.B., cared for her

and believed that she was being mistreated by current providers. She was seeking to have M.B. accept her recommendations for evaluation.

1.116 Based on his review of the respondent's letters to the Department and to M.B., Dr. Fink testified that the respondent showed no insight into how her behavior may have harmed M.B. Because of this, Dr. Fink believed that there is a danger to the public if the respondent is allowed to continue to practice counseling.

1.117 Based upon his analysis of the tapes, the letters prepared by the respondent, her entry into a social and sexual relationship with her client within two years of therapy, her advocating for a former client currently in therapy with another counselor and her confusion about her present status with her former client, Dr. Fink believed the respondent presents a threat to the public health, safety and welfare in her role as a licensed counselor and certified social worker. Dr. Fink also believed that the respondent's actions reflect upon and lower the standard of the therapeutic industry in the eyes of the general public.

1.118 The respondent testified that she knew of no prohibition against sexual contact with a former client in 1986 but she was aware that there was a standard of care regarding sexual contact with a current client. The respondent acknowledges having established a social relationship with another former client, but that was after seven years had elapsed from the last therapeutic session.

1.119 For the three and one-half years prior to the date of these proceedings, the respondent has been employed full time by the state of Washington as a unit social worker at Rainier School, Buckley, Washington. She worked at that school on a part time basis approximately two years prior to her present appointment. The position the respondent holds does not require that she be registered as a counselor or certified as a social worker. Rainier School is considering imposing registration and certification as requirements in the near future.

1.120 At Rainier School the respondent works primarily with patients who are profoundly retarded. As their social worker, the respondent attends to the social service and advocacy needs of these patients.

1.121 At hearing, the Respondent submitted copies of references from colleagues with whom she has worked at Rainier School, including the clinical director. The professional and support staff providing the references considered the respondent's skills as a social worker at the school to be superior. Relatives of patients at the school also praised her skills and compassion when working with patients. The respondent originally obtained these references to add credibility to the complaints she had filed with the Department against M.B.'s therapists. The respondent did not tell the individuals providing the references about M.B.'s complaint against her. Although these letters are very favorable and supportive of the respondent and her work at Rainier School, the absence of a reference from the respondent's immediate supervisor is noted. Further, there is some indication from the Respondent's letter to M.B. dated March 27, 1989 that the Respondent may have been asked by her supervisor at that time to stop having contact with a particular client at the school.

1.122 In addition to her full time employment at Rainier School, the respondent engages in private practice as a

counselor. The respondent desires to remain in family therapy practice. She notes that although she specializes in providing therapy to people with disabilities, she wishes to continue to be able to serve the broader community as well.

II. CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Review Judge now enters the following Conclusions of Law:

2.1 Registration for counselors and certification for social workers was first enacted by Laws of 1987, chapter 512, which became effective July 26, 1987. This act applies the Uniform Disciplinary Act, chapter 18.130, to registered counselors and certified social workers.

2.2 The respondent, Joan K. Heinmiller, is registered as a counselor and is certified as a social worker pursuant to chapter 18.19 RCW and is subject to the provisions of RCW 18.130.180.

2.3 "Counselor" means an individual, practitioner, therapist, or analyst who engages in the practice of counseling to the public for a fee. RCW 18.19.020(6).

2.4 "Counseling" means employing any therapeutic techniques, for a fee that offer, assist or attempt to assist an individual or individuals in the amelioration or adjustment of mental, emotional, or behavioral problems, and includes therapeutic techniques to achieve sensitivity and awareness of self and others and the development of human potential. RCW 18.19.020(5).

2.5 "Treatment" means assisting or attempting to assist an individual and does not include the initial assessment/evaluation. WAC 246-810-010(4).

2.6 "Certified social worker" means a person certified to practice social work pursuant to RCW 18.19.110. RCW 18.19.020(3).

2.7 Certified social work practice is that aspect of counseling that involves the professional application of social work values, principles, and methods by individuals trained in accredited social work graduate programs and requires knowledge of human development and behavior, knowledge of social systems and social resources, an adherence to the social work code of ethics, and knowledge of and sensitivity

to ethnic minority populations. It includes, but is not limited to, evaluation, assessment, treatment of psychopathology, consultation, psychotherapy and counseling, prevention and educational services, administration, policy-making, research, and education directed toward client services.
RCW 18.19.110(3).

2.8 The definitions identified above together with RCW 18.19.010 establish the broad public purpose of the Counselor Registration Act.

2.9 An undefined statutory word is given its plain and ordinary meaning. Shoreline C.C. v. Employment Security, 120 Wn.2d, 394, 403 (1992). The common meaning of "client" is a person who engages the professional advice or services of another. Webster's Third World International Dictionary, G & C Merriam Company (1963). Once a person engages the professional services of a registered counselor or certified social worker, a counselor- client relationship is established and that person remains a client until that relationship ends. The counselor-client relationship does not necessarily end when a client stops seeing the counselor in counseling sessions. Even when a counselor and client agree

that the sessions will end and the counseling sessions are terminated, the counselor-client relationship and the therapeutic bond may remain intact.

2.10 The privilege of practicing counseling in this state is subject to the state's police power. The legislature has defined counseling and has granted the Department of Health the right to determine when the practice is being performed. This definition is not contingent upon the theories or definitions given by the practitioners applying concepts.

2.11 The courts recognize that the relationship of a health care professional and his or her patient or client is a fiduciary one of the highest degree. It involves every element of trust, confidence and good faith. See Lockell v. Goodill, 71 Wn.2d 654, 656, 430 P.2d 589 (1967). A fiduciary relationship between two persons may exist either because the nature of the relationship between the parties is historically considered fiduciary in character or the relationship between the parties is fiduciary in nature as a matter of fact. McCutcheon v. Brownfield, 2 Wn. App. 348, 356, 467 P.2d 868 (1970), Liebergesell v. Evans, 93 Wn.2d 881, 8980, 613 P.2d 1170 (1980). In other words, a fiduciary relationship can

be deemed to exist in fact in those cases and under those circumstances where a client justifiably expects his/her welfare to be cared for by another. The relationship between a mental health therapist, regardless of that person's professional label, and his or her client or patient is fiduciary in nature as a matter of law.

2.12 Beginning in 1985, the respondent was a mental health care professional functioning as a counselor to M.B. She wash in a fiduciary relationship with her client which involved every element of trust, confidence and good faith.

2.13 In 1985 and 1986, as under the present statute, the Uniform Disciplinary Act for Health Professions, chapter 18.130, proscribed acts involving moral turpitude, dishonesty or corruption, RCW 18.130.180(l), incompetence, negligence or malpractice, RCW 18.130.180(4), and sexual contact or abuse of a client or patient, RCW 18.130.180(24), by health care professionals.

2.14 Regulatory statutes have the broad public purpose of protecting health, safety and welfare. When

considering an application for registration as a counselor or certification as a social worker, the Counselor Program may request information necessary to determine whether there are grounds for denial of registration or issuance of a conditional registration. RCW 18.19.090 and RCW 18.130.160.

2.15 The Counselor Program cannot impose a penalty upon the respondent for an act which, when committed, had no such consequence. Hammack v. Monroe Street Lumber Co., 54 Wn.2d 224, 339 P.2d 684 (1959). However, it can deny registration or impose conditions on registration if antecedent facts establish that an applicant is unfit to practice or poses a threat to the public. On a form prepared for the purpose of obtaining information from applicants for registration as a counselor, the Counselor Program was attempting to determine if antecedent facts reflected an unfitness to practice or the need to restrict registration.

2.16 RCW 18.130.180(2) defines unprofessional conduct as misrepresentation or concealment of a material fact in obtaining a license.

2.17 The Department must have complete and reliable information upon which to evaluate an applicant for registration, certification or licensure. An applicant for professional licensure has a special relationship with the state because of the state's reliance on information provided by the applicant in making its determination to grant or deny a license. This special relationship with the state creates a duty in the applicant to provide the state with complete and accurate answers to all application questions.

2.18 Misrepresentation or concealment of material information on a licensure application may serve as the basis for disciplinary action for two reasons. First, in some situations such conduct may indicate dishonesty or deception. The public has a legitimate and reasonable expectation that a health care professional will act in an honest and trustworthy fashion. Therefore, even if the undisclosed information would not have resulted in a different decision by the Department concerning the application for licensure, an applicant's conduct in misrepresenting or concealing information may warrant disciplinary action. Second, in some situations the undisclosed information may indicate a person's unfitness to

practice in the profession for which the person applied and was granted a license. In such a case, if the applicant had disclosed the information for the Department's consideration in making its licensing decision, the Department would have denied the application or would, have granted a conditional license. A licensee should not be permitted to continue in a profession for which the licensee is not fit or qualified to practice. This is especially true when the Department could not have reasonably obtained the information except by the licensee's disclosure on the application.

2.19 Within RCW 18.130.180(2), a material fact is a fact to which significance is attached in deciding whether or not to grant, deny or condition licensure. The suppression of a material fact which a person in good faith is bound to disclose is equivalent to a false representation. The concealment of a fact which one is bound to disclose is an indirect representation that such fact does not exist. Boonstra v. Stevens-Norton. Inc., 64 Wn.2d 621, 625, 393 P.2d 287 (1964). An applicant's withholding of known material information or an applicant's provision of false information in

response to questions on an application for a professional license constitutes misrepresentation or concealment.

2.20 The personal data section of the application for certification as a social worker was designed by the Department of Health to obtain information concerning the qualifications and fitness of an applicant. Such information is material to the Department's decision to grant or deny a professional license. Thus, if the respondent engaged in conduct within the past ten years which was described in RCW 18.130.180 as unprofessional conduct, she had a duty to disclose it to the Counselor Program for its consideration in deciding if registration or certification should be issued, denied or conditioned. RCW 18.19.090 and RCW 18.180.160.

2.21 The respondent has denied any conduct within the past ten years which was within the ambit of RCW 18.130.180. To establish a violation of RCW 18.130.180(2), the Counselor Program must show by a fair preponderance of the evidence that unprofessional conduct did occur.

2.22 RCW 18.130.180(1) defines unprofessional conduct as the commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not. In a legal sense, an act of moral turpitude is one which violates commonly accepted standard of good morals, honesty or justice. In Re Hopkins, 54 Wn. 569, 103 P.2d 805 (1909). Read as a whole, this provision of the Uniform Disciplinary Act prohibits conduct indicating an unfitness to practice the profession. Haley v. Medical Disciplinary Board, 117 Wn.2d 720, 742, 818 P.2d 1062 (1991).

2.23 As noted above, a fiduciary relationship arises as a matter of law between a mental health care professional, including counselors and social workers, and his or her client. When a counselor abuses this relationship, he/she violates the trust, damages the client and demeans the profession.

2.24 M.B. sought counseling from the respondent for help with personal and emotional issues. Her status as a client placed M.B. in a vulnerable position in relation to the respondent. Similarly, the respondent's status as a counselor, placed the respondent in a position of power and authority in

relation to M.B. The respondent used the trust and confidence she attained as M.B.'s counselor to facilitate, establish and maintain a social and intimate relationship with M.B. during the counseling sessions. The basis for their sexual relationship was also established during their counseling sessions.

2.25 While the social, intimate and/or sexual relationship between the respondent and M.B. may not constitute moral turpitude in a social setting, it is raised to this level in the professional setting by the nature of the counselor-client relationship. The respondent initiated and established a social and/or intimate relationship with M.B. to meet her own needs. Further, the respondent engaged in seductive and sexual activities with M.B. while M.B. was influenced by the continuing psychological aspects of the counselor-client relationship. These actions by the respondent directly relate to and indicate her unfitness to practice counseling. The respondent's conduct also diminishes the standing of the counselor and social work professions in the eyes of the public. The respondent's conduct constituted moral turpitude

and unprofessional conduct within the meaning of RCW 18.130.180(1).

2.26 Furthermore, the respondent's use of the trust and confidence she had achieved as M.B.'s therapist to establish a social relationship and initiate a sexual relationship with M.B. creates disrepute on the counselor and social work professions in the eyes of the public. Such conduct constitutes moral turpitude and unprofessional conduct within the meaning of RCW 18.130.180(1).

2.27 RCW 18.130.180(24) defines unprofessional conduct as abuse or sexual contact with a client.

2.28 At the first counseling session in November 1985, M.B. became a client of the respondent and a counselor-client relationship was established. M.B. remained a client of the respondent until their counselor-client relationship ended. The fact that M.B. was no longer receiving counseling from the respondent in a formal structured environment or that the respondent's clinical notes indicate that the counseling sessions had ended, does not mean that the counselor-client relationship no longer existed.

2.29 The respondent contends that M.B. was not her client when sexual contact occurred. In support of this contention, the respondent cites Haley v. Medical Disciplinary Board, 117 Wn.2d 720, 818 P.2d 1062 (1991). In Haley, the Washington State Medical Disciplinary Board disciplined a physician, Dr. Haley, for having had sexual contact with a patient. Because the Board had not made a specific finding that the individual was actually Dr. Haley's patient when sexual contact occurred, the Washington Supreme Court was faced with a de novo decision as to whether the individual remained a patient of Dr. Haley after her last medical appointment. The Washington Supreme Court's analysis of this issue is relevant to this case.

2.30 In Haley, the Court found that Dr. Haley's limited and brief emergency surgical treatment of an individual did not create the necessary ongoing physician-patient relationship to support a finding that she remained his patient when sexual contact occurred three months after her last medical appointment. Dr. Haley is a surgeon who had performed an emergency splenectomy on a patient. His medical relationship with this patient was limited to the

surgery and to brief post-operative care. Although the court found that the individual was not Dr. Haley's patient when sexual contact occurred, the Court concluded that the requisite professional relationship to support such a finding would have existed with almost any other type of physician who typically has an ongoing relationship with patients. Haley, supra at 730.

2.31 Unlike Dr. Haley's very limited relationship with his patient, the respondent's counseling relationship with M.B. was unrestricted, ongoing and intense. The respondent provided individual counseling to M.B. on generally a weekly basis for over an eight month period of time. During the course of these sessions, M.B. revealed private and personal information about herself and her relationships with others. M.B. felt emotionally dependent on the respondent and trusted her expertise and abilities as a counselor. She looked to the respondent for advice and feedback on almost a weekly basis. The respondent told M.B. that she held back energy for those clients who sought her advice after counseling sessions ended. Furthermore, the respondent had physical sexual contact with M.B. the day following their last therapy session. The

respondent's counseling relationship with M.B. is consistent with the kind of ongoing professional relationship that the Washington Supreme Court determined is necessary to establish the existence of a professional relationship beyond the last treatment appointment. M.B. remained the respondent's client after their last counseling session ended.

2.32 Further, the respondent's stated belief that M.B. was somehow a "former" client the day following their last counseling session is wholly unreasonable. Their professional relationship not only continued but formed the basis of their personal and sexual relationship.

2.33 Further, sexual contact as that term is used in RCW 18.130.180(24) is not limited to physical sexual contact with a client. Sexual contact can include verbal behavior that may reasonably be interpreted as sexual in nature. Given the circumstances leading up to, and the context of, the last counseling session on August 27, 1986, the verbal interchange between the respondent and M.B. at that session can reasonably be interpreted as sexual in nature and as such constitutes sexual contact with a client in violation of RCW 18.130.180(24).

2.34 RCW 18.130.180(4) defines unprofessional conduct as incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed.

2.35 A counselor must establish and maintain the boundaries of the professional relationship with her client. A blurring of roles and boundaries creates the potential for a conflict of interest between the needs of the counselor and the best interests of her client.

2.36 The respondent failed to maintain professional boundaries in her counseling relationship with M.B. The social and intimate relationship that developed between the respondent and M.B. during the therapy sessions is indicative of the boundary problems that existed in their professional relationship. The respondent's inability to maintain her proper role as therapist resulted in the respondent's establishment of a social relationship with M.B. to satisfy her own needs. Further, the respondent's inability to maintain professional boundaries resulted in her loss of objectivity and the impairment of her judgment and ability to provide effective counseling services to M.B.

2.37 The respondent's inability to assess and manage the emotional aspects of the therapeutic relationship with M.B., the respondent's failure to maintain boundaries within the therapeutic relationship, and/or the respondent's inadequate handling of termination issues within the therapeutic relationship constitutes incompetence, negligence, or malpractice. This conduct by a registered counselor or certified social worker not only creates an unreasonable risk that a client may be harmed but was emotionally and/or psychologically injurious to M.B. This conduct by the respondent constituted a violation of RCW 18.130.180(4).

2.38 Distorted perceptions and emotional difficulties are also indicative of the harm that may befall a client as a result of the incompetent or negligent actions of a counselor. In this case, M.B. viewed the respondent's actions during their relationship as abusive. Although M.B. attempted to relate specific incidents of abuse during their relationship, the incidents as described did not seem to rise to the level of abuse. However, M.B.'s characterization of the incidents as abusive is understandable because the counselor-client relationship formed the basis for the social and sexual

relationship. M.B. entered the social relationship with the expectation that the respondent would maintain the qualities she exhibited as a counselor. When the respondent deviated from this expectation, M.B. felt abused. Her illusions of the respondent were shattered by behaviors that she believed were not fitting of a counselor. M.B.'s perceptions of and expectations about the respondent in their social relationship were distorted by the very foundation upon which their relationship was built.

2.39 The respondent's challenge to Dr. Fink's credentials as an expert witness fails. Based on his training and experience, Dr. Fink is qualified to testify about the issues raised in this case because the issues concern the nature and the boundaries of the therapeutic relationship between a client and any person providing counseling or therapy. Unlike some issues which may be unique to the social work profession, the issues in this case transcend the field of social work and permit a mental health expert to provide relevant and credible evidence regardless of his or her credentials.

2.40 Further, testimony at the hearing established that the 1980 Code of Ethics of the National Association of

Social Workers prohibited a social worker from engaging in sexual activity with a client. This testimony provides independent evidence of the standard of care in 1986 for social workers concerning sexual contact with a client. Because M.B. remained the respondent's client the day following their last counseling session, the respondent violated the standard of care for social workers by engaging in sexual activity with her client.

2.41 Finally, the need for expert testimony concerning the propriety of the respondent's activities in this case is questionable. Respondent's almost immediate sexual activity with a client she had been counseling for eight months is inherently improper and below the standard of care for any person providing counseling services.

2.42 Prior to certification as a social worker, the respondent engaged in conduct that is described as unprofessional conduct under RCW 18.130.180(l) - moral turpitude; RCW 18.130.180(4) - negligence, malpractice and/or incompetence; and under RCW 18.130.180(24) - sexual contact with a client. The circumstances of this case show that the respondent knew or should have known that her

negative response to the application question was false and that information concerning her counseling and social relationships with M.B. was material to the Counselor Program's determination of her qualifications and fitness to practice counseling and social work. Further, the Department could not have reasonably obtained such information except by the respondent's disclosure on her application. Thus, the Department reasonably expected, and justifiably relied upon, the respondent to disclose such information on her application.

2.43 Intentionally or otherwise, the respondent's failure to provide correct and complete information on her application was a breach of her duty to the Department to accurately and completely answer application questions. The respondent's false answer on her application for certification as a social worker was a misrepresentation of a material fact and/or a concealment of material information known to the respondent. Such conduct constitutes unprofessional conduct under RCW 18.130.180(2).

2.44 It is unprofessional conduct for a registered counselor or a certified social worker to interfere with an

investigation or disciplinary proceeding by willful misrepresentation of facts before the disciplining authority or its authorized representative, or by the use of threats or harassment against any patient or witness to prevent them from providing evidence in a disciplinary proceeding or any other legal action. RCW 18.130.180(22).

2.45 To threaten is to express an intention to inflict evil, injury, or damage on another. State v. Brown, 50 Wn. App. 406, 409, 748 P.2d 756 (1988). To harass is to annoy or torment repeatedly and persistently. Webster's II, New Riverside University Dictionary, The Riverside Publishing Company, 1984, 1988.

2.46 Many of the Respondent's letters to M.B. were written after the Respondent knew of M.B.'s complaint to the Department about her. In these letters, the respondent repeatedly made accusations and derogatory statements concerning M.B.'s counselors, evaluators and attorney. A reasonable interpretation of these letters is that the respondent intended to impugn the character of M.B.'s current providers and raise doubt as to their abilities in M.B.'s mind.

2.47 In the context of this situation and under the circumstances which existed at the time, the respondent's repeated and persistent written communications with M.B. concerning her treatment providers and attorney can reasonably be construed as threats and/or harassment in an attempt to dissuade or prevent M.B. from pursuing her complaint with the Department.

2.48 Furthermore, the respondent's testimony revealed an awareness of the potential for discrimination against lesbians. With this awareness, the respondent wrote to M.B. that she would expose M.B.'s sexual orientation in a book that she intended to write. This action by the respondent is a clear expression of her intent to harass and threaten M.B. with the hope that she would not pursue her complaint. Although the respondent denies any intent to threaten or harass M.B., the evidence does not support such testimony.

2.49 The respondent's threats and/or harassment interfered with the disciplinary investigation and proceeding by creating fear and apprehension in a complaining witness.

2.50 The respondent used threats and/or harassment against M.B. to prevent her from pursuing her complaint with the Department. The respondent's conduct constitutes unprofessional conduct in violation of RCW 18.130.180(22).

2.51 The respondent's attempts to shift some or all of the responsibility for their sexual or social relationship to M.B. is improper. Even if M.B. had encouraged a social or sexual relationship or agreed upon the termination of her therapy sessions, it is the responsibility of the counselor, not the client, to recognize issues and to deal with them appropriately.

2.52 The respondent does not dispute that she had sexual contact with M.B. the day following their last counseling session; yet the testimony and evidence admitted at the hearing reveals that the respondent had not developed an understanding and awareness of the boundary issues inherent in even these undisputed facts. This lack of insight raises serious concern about the respondent's ability to establish and/or maintain the boundaries necessary for a therapeutic relationship.

2.53 The respondent's lack of awareness of the boundary issues inherent in the admitted facts of this case, as well as, the social relationship that the respondent initiated with M.B. during the counseling sessions, raise serious concerns about the respondent's professional judgment and insight in similar situations. Without the respondent's awareness or understanding of the dynamics at work in the formation of her social and sexual relationship with M.B., a risk remains that the respondent will again violate professional boundaries with other clients.

2.54 Although Dr. Bass testified that there was no risk that the respondent would again develop a sexual relationship with someone she had seen in counseling sessions, Dr. Bass is not experienced in the treatment of therapists who have become sexually involved with their clients. Dr. Bass also stated that the respondent had told him that the social relationship with M.B. was not planned. Further, Dr. Bass had not listened to the tapes of the therapy sessions and did not read any of the letters written by the respondent to the Department. Therefore, Dr. Bass' opinion regarding the risk of future boundary violations by the

respondent was based on incomplete and inaccurate information and as such is discounted accordingly.

2.55 Although the respondent cannot be disciplined for misconduct that occurred prior to her being registered as a counselor or certified as a social worker, such conduct can be considered when applying a sanction for the present violations of RCW 18.130.180(2) and RCW 18.130.180(22).

2.56 Upon a finding that a license holder has committed unprofessional conduct, the disciplining authority may issue an order providing for one or any combination of the following:

(1) Revocation of the license;

(2) Suspension of the license for a fixed or indefinite term;

(3) Restriction or limitation of the practice;

(4) Requiring the satisfactory completion of a specific program of remedial education or treatment;

(5) The monitoring of the practice by a supervisor approved by the disciplining authority;

(6) Censure or reprimand;

(7) Compliance with conditions of probation for a designated period of time;

(8) Payment of a fine for each violation not to exceed one thousand dollars per violation;

(9) Denial of the license request;

(10) Corrective action;

(11) Refund of fee billed to and collected from the consumer. RCW 18.130.160.

2.57 Suspension of the respondent's social worker certification and counselor registration is appropriate disciplinary action for either of the violations of the Uniform Disciplinary Act found in this case. The respondent's concealment and/or misrepresentation of material information in obtaining her social worker certification and her lack of insight into the serious boundary problems that are inherent in the uncontested facts of this case require suspension of the respondent's registration and certification. Furthermore, the respondent's threat to and/or harassment of a witness is indefensible and can not be tolerated. This conduct also compels suspension of the respondent's counselor registration and social worker certification. In order to protect the public and maintain minimum standards of competence and conduct

in the practice of counseling and social work, the suspension of the respondent's registration as a counselor and certification as a social worker is deemed to be in the public interest.

2.58 If the disciplining authority believes that an applicant may be unable to practice with reasonable skill and safety to consumers by reason of any mental condition, a statement of charges in the name of the disciplining authority shall be served on the applicant and notice shall be issued providing an opportunity for a hearing. The hearing shall be limited to the sole issue of the capacity of the applicant to practice with reasonable skill and safety. If the disciplining authority determines that the applicant is unable to practice with reasonable skill and safety for one of the reasons stated in this subsection, the disciplining authority shall impose such sanctions under RCW 18.130.160 as are deemed necessary to protect the public. RCW 18.130.170(1).

2.59 In investigating or adjudicating a complaint or report that an applicant may be unable to practice with reasonable skill and safety by reason of a mental condition, the disciplining authority may require an applicant to submit to a mental examination by one or more licensed or certified health

professionals designated by the disciplining authority. In addition to any examinations ordered by the disciplining authority, the applicant may submit physical or mental examination reports from licensed or certified health professionals of the applicant's choosing and expense. RCW 18.130.170(2).

2.60 While the provisions of RCW 18.130.170 do not mandate a therapeutic evaluation by a health professional in a clinical setting, the state has the burden of proving by a preponderance of the evidence that the respondent is unable to practice counseling or social work with reasonable skill and safety because of a mental condition. In the immediate case, the Counselor Program has not obtained a mental or physical evaluation of the respondent. Although the respondent's conduct in this case raises concern regarding an underlying mental condition, the evidence is insufficient to establish by a preponderance of the evidence that the respondent cannot currently practice with reasonable skill or safety because of a mental or physical condition.

III. FINAL ORDER

From the foregoing findings of fact and conclusions of law, NOW THEREFORE, IT IS HEREBY ORDERED THAT:

3.1 The counselor registration and social worker certification of Joan K. Heinmiller are hereby SUSPENDED INDEFINITELY.

3.2 Ms. Heinmiller may submit a written request for a partial stay of the suspension of her registration and/or certification from the Counselor Program of the Department of Health. If Ms. Heinmiller requests a partial stay of the suspension to engage in work in which certification as a social worker or registration as a counselor is required by statute, Ms. Heinmiller must submit the following with her written request for a partial stay of the suspension:

(a) A detailed written employment plan describing her proposed practice as a counselor or social worker and including a specific description of the job duties, the setting in which services will be provided, a description of the type of counseling services to be provided, a description of the clients to be served and the kinds of issues that may arise, the name and qualifications of the

person(s) immediately supervising her work and any other information that the Counselor Program may deem necessary to evaluate Ms. Heinmiller's proposed employment.

(b) A then current psychological evaluation addressing Ms. Heinmiller's ability to practice counseling with reasonable skill and safety by a licensed professional experienced in the evaluation and treatment of health care professionals with boundary issues, who is approved in advance by the Counselor Program of the Department of Health and who has received a copy of this order prior to the evaluation;

(c) A certification verifying Ms. Heinmiller's attendance and satisfactory completion of at least 30 hours of education or training on boundary issues, including transference/countertransference phenomena, which has been approved in advance by the Counselor Program;

(d) Any other information or reports that the Counselor Program may deem necessary to evaluate Ms. Heinmiller's request for a partial stay of the suspension.

3.3 The Counselor Program may grant, deny or grant with conditions, Ms. Heinmiller's request for a partial stay of the suspension pursuant to Section 3.2 above. If the Counselor Program grants such request, Ms. Heinmiller must practice solely within the employment plan approved by the Counselor Program and must comply fully with any and all restrictions and conditions set forth by the Counselor Program as a condition to granting the partial stay of the suspension.

3.4 Ms. Heinmiller may request full reinstatement of her counselor registration and/or social worker certification no sooner than six (6) years from the date of this final order provided she has satisfactorily practiced counseling for three consecutive years under the supervision of a licensed mental health professional who has received a copy of this final order and who has been approved in advance by the Counselor Program. Ms. Heinmiller must supply written verification acceptable to the Counselor Program of her satisfactory completion of the three years of supervised practice at the time of any request for full reinstatement of her counselor registration or social worker certification. Ms. Heinmiller must request and receive a partial stay of the suspension

pursuant to this order prior to engaging in any conduct which requires counselor registration or social worker certification, including the three years of supervised practice described herein. In addition to any other information that the Counselor Program may deem necessary to evaluate Ms. Heinmiller's request for full reinstatement, the Counselor Program may require a then current psychological evaluation addressing Ms. Heinmiller's ability to practice counseling without supervision and restrictions by a licensed professional experienced in the evaluation and treatment of health care professionals with boundary issues, who has received a copy of this final order and who has been approved in advance by the Counselor Program of the Department of Health.

3.5 Nothing in this order requires or shall be construed to require the Counselor Program to approve of or conditionally grant Ms. Heinmiller's request(s) for a partial stay of the suspension or to grant her request(s) for full reinstatement of her counselor registration or social worker certification.

3.6 Ms. Heinmiller is responsible for and shall pay all costs and fees relating in any way to her request(s) for a

partial stay of the suspension, to her compliance with any conditions, requirements or restrictions imposed pursuant to a partial stay of the suspension and to any requests for removal of conditions or reinstatement of her counselor registration or social worker certification.

3.7 Ms. Heinmiller shall not be required to pay the counselor registration or social worker certification renewal or annual licensing fees during the period of time in which her registration and/or certification is suspended. If the Counselor Program grants a partial stay of the suspension pursuant to this order, Ms. Heinmiller shall pay the full registration and/or certification renewal fees for the time in which a partial stay of the suspension is granted.

3.8 Joan K. Heinmiller shall commit no act in violation of this order or Chapter 18.19 RCW or chapter 18.130 RCW.

3.9 IT IS HEREBY FURTHER ORDERED that the allegations that Joan K. Heinmiller is unable to practice counseling with reasonable skill and safety because of a mental condition pursuant to 18.130.170 are hereby dismissed.

THE PARTIES ARE ADVISED, pursuant to RCW 34.05.461 and .470, that within ten days of service of this Order you may file a petition for reconsideration with the Office of Professional Standards, Department of Health, 2413 Pacific Avenue, P.O. Box 47872, Olympia, Washington 98504-7872. The petition shall state the specific grounds upon which relief is requested. The petition for reconsideration shall not stay the effectiveness of this Final Order. The petition is deemed to have been denied if, within twenty days of the date of its filing, the Review Judge has not disposed of your petition or has not served you with written notice specifying the date by which action will be taken on your petition.

Proceedings for judicial review may be instituted by filing a petition in the Superior Court in accord with the procedures specified in Title 34 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review must be filed within thirty (30) days after you have been served with this Final Order, as provided by RCW 34.05.542.

DATED THIS 31st DAY OF MARCH, 1993.

/Colleen Klein/
COLLEEN KLEIN
Review Judge
Office of Professional Standards

APPENDIX G

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
COUNSELORS

In the Matter of the Counselor Registration of JOAN K. HEINMILLER Respondent.	NO. 91-07-24-148 RC FINDINGS OF FACT, CONCLUSIONS OF LAW AND INITIAL ORDER

HISTORY OF THE PROCEEDINGS

Pursuant to notice duly given, an administrative hearing was held before James D. Stanford, duly appointed administrative law judge, in the Department of Health, Melbourne Tower #314, 1511 Third Avenue, Seattle, Washington on February 18, 19, 20, 21 and 27 and April 3, 1992 and in the Department of Licensing, Greenwood Driver License Examining Station, 320 North 85th Street, Seattle, Washington, on February 22 and April 4 and 18 and May 6, 1992 in the matter of the disciplinary action in the matter of

the registration as a counselor and certification as a social worker of Joan K. Heinmiller.

The Department of Health (petitioner) was represented by Margaret M. Bichl, assistant attorney general. Joan K. Heinmiller (respondent) was represented by Elaine G. Ducharme, attorney at law.

On June 24, 1991 the Secretary of the petitioner caused a statement of charges to be issued against the respondent alleging violations of Counselor Registration Act, chapter 18.19 RCW and the Uniform Disciplinary Act for Health Professions, chapter 18.130 RCW. Upon her receipt of service of the statement of charges, the respondent requested an adjudicative proceeding. The respondent was duly notified of the time and the place of the hearing.

During prehearing conferences and during the course of the adjudicative proceedings, the administrative law judge entered rulings concerning discovery and jurisdiction and on motions made by the parties. The rulings of the administrative law judge on those matters are endorsed and incorporated herein by reference as memorialized in the prehearing

conference orders and in the transcript of the adjudicative proceedings.

At the commencement of the proceedings the respondent entered a motion to dismiss those charges which related to conduct that occurred prior to the enactment of chapter 18.19 RCW. The petitioner opposed the motion. The administrative law judge ruled that the petitioner cannot retrospectively impose a penalty on a registrant or licensee for an act which, when committed, had no such consequence. Hammack v. Monroe Street Lumber Co., 54 Wn.2d 224, 339 P.2d 684 (1959).

The administrative law judge, having considered the evidence, now enters the following findings of fact:

FINDINGS OF FACT

1.1 Between February 3, 1988 and the date of these proceedings, the respondent, Joan Heinmiller, has been registered as a counselor. Since October 17, 1988, she has also been certified as a social worker. The respondent holds a master's degree in social work from the University of Denver

granted in 1974. She is also certified as a social worker in the state of Illinois.

1.2 On or about October 17, 1988 the respondent entered with the Department of Licensing, predecessor to the petitioner, an application for certification as a social worker. Under that section of the application entitled "PERSONAL DATA," the respondent entered a negative answer to question one (1) by placing an "X" in the box in the column headed "no" to the immediate right of the following question:

> WITHIN THE PAST TEN YEARS, HAVE YOU ENGAGED IN ANY OF THE CONDUCT DESCRIBED IN THE UNIFORM DISCIPLINARY ACT, 18.130.180 RCW, EXCLUDING THE CONDUCT DESCRIBED IN 18.130.180(6) AND 18.130.180(23)?

1.3 For the previous three and one-half years, the respondent has been employed full time by the state of Washington as a unit social worker at Rainier School, Buckley, Washington. She worked at that school on a part time basis approximately two years prior to her present appointment. The position the respondent holds does not require that she be registered as a counselor or certified as a

social worker. Rainier School is considering imposing registration and certification as a requirement in the near future.

1.4 At Rainier School the respondent works primarily with patients who are profoundly retarded. As their social worker, the respondent attends to the social service and advocacy needs of these patients.

1.5 The respondent has an excellent reputation as a social worker at Rainier School. Her skills are considered superior by both professional and support staff. Relatives of patients at the school have praised her skills and compassion when working with patients.

1.6 In addition to her full time employment, the respondent engages in private practice as a counselor.

1.7 During 1985, the respondent was a social worker and counselor in private practice at Valley Cities Mental Health Center (Valley Cities), Auburn, Washington. She performed counseling services at that facility under a personal service contract which identified her as an independent contractor.

1.8 While at Valley Cities, the respondent provided outpatient mental health services as a family systems therapist. Her focus was on short-term problem solving. She provided counseling services in both individual and group settings. The respondent did not provide clients with extensive long term psychoanalytic or psycho-dynamic therapy.

1.9 The respondent adopted a therapeutic technique in which she provides support to hold her clients at the level at which they enter therapy. She then works with them to increase their effectiveness in dealing with their issues. As a therapist she loans her expertise to provide reassurance and guidance to her clients. In providing counseling services, the respondent must overcome any fear of therapy a client has while keeping her expertise in context. She must not make a client more vulnerable.

1.10 Clients referred to the respondent by Valley Cities were rated at the beginning and at the end in relation to specific symptomatology. The grading was initially done at the first interview. It was then subject to periodic adjustments during the course of the therapeutic counseling program.

1.11 At all times material hereto, the sexual orientation of the respondent has been as a lesbian. For a number of years prior to the time material hereto, the respondent maintained a live-in sexual relationship with Rosemary Unterscher.

1.12 On or about November 6, 1985, Marian Blair contacted Valley Cities seeking counseling for panic attacks. In her application for counseling, Marian Blair identified to the intake personnel that her presenting problem was "panic attacks 1st time in life, feels like she has a lot of business to sort out." Marian Blair specified that she preferred to have a woman therapist.

1.13 At the time she presented for counseling at Valley Cities, Marian Blair, born August 24, 1943, was in a seven year relationship with a man by the name of Tony Williams. Prior to this association, she had been married and divorced twice. She had two daughters by her first marriage, Sylrie, age twenty, and Jordie, age seventeen. These daughters were in the process of emancipating themselves from Marian Blair's home.

1.14 The business Marian Blair wanted to "sort out" through counseling at Valley Cities included concerns about her relationship with her mother, concerns about her mother's health, dissatisfaction with her relationship with Tony Williams, anticipation about her skills as a parent now that her children were emancipating, unhappiness with her employment as a teacher of preschool children and a general loss of joy in her life. The cumulative effect of these problems caused a panic attack which, according to a medical evaluation, was without any apparent physiological pathology. A medical evaluation suggested that the panic attacks were the result of the depression associated with changes in her life.

1.15 Valley Cities assigned the respondent to be the therapeutic counselor of Marian Blair. Marian Blair was accepted as a client by the respondent. She scheduled weekly counseling sessions which, except for vacations and holidays, continued until August 27, 1986. During this therapy, Marian Blair was straightforward in reporting her experience and reactions. The respondent determined that Marian Blair was not an average client with average pain.

1.16 At the initial counseling session on November 13, 1985, the respondent entered a diagnosis that Marian Blair suffered from a dysthymic disorder (unmet needs), then DMS-II, with depressive neurosis. Dysthymic disorder with depressed functioning requires a therapist to understand what stresses are going on within the client, what is missing, what is different, and how long this has been going on.

1.17 Marian Blair described long standing depressive symptoms. The depression, which was generally moderate or mild in nature, had lasted at least two years. The diagnosis implied conflict and unmet needs. Neither at presenting, nor during the course of the counseling services, did Marian Blair ever personally raise sexual orientation as an issue.

1.18 During the early counseling sessions, Marian Blair identified a number of changes in her life which were creating a sense of loss. In addition to family adjustments, she told the respondent about the loss of four close women friends who had recently moved from the area. The respondent

inquired into who was available to provide the support she sought.

1.19 Marian Blair talked about disappointments, lack of spontaneity, and lack of response from Tony Williams. She expressed a fear that she would never find someone who matched her level of emotionality and need for intimacies. She wanted Tony Williams to understand her sense of pain. The respondent had advised Marian Blair to no longer sleep with Tony Williams if she was feeling upset.

1.20 A subject addressed throughout this therapy was Marian Blair's complaint that men did not appreciate her. She felt that men discounted her. They found her over-reactive and inconvenient. These feelings regarding the male were formed in her childhood relations with her father, continued through her two marriages and were now present in her relationship with Tony Williams.

1.21 Early in the counseling sessions the respondent made an inquiry as to whether sexual orientation might be a cause of the distress felt by her client. The subject was discretely raised when, after Marian Blair completed a

description of her inability to have rewarding relationships with men, the respondent asked the question "What about women?" When raising this subject, the respondent noted that, while Marian Blair complained of an absence of rewarding relationships with men, she had also described unique, warm, intimate, and supportive relationships with women. The respondent acknowledges that at this point in therapy she clearly embraced the possibility that her client was not going to find personal fulfillment with a man in a traditional sense. She did not pursue the subject again until the May 14, 1986 session.

1.22 During the February 16, 1986 therapy session, Marian Blair told the respondent that, for the first time in her life, she had considered suicide as a solution for her continuing pain. The thought had crossed her mind as an alternative and that had impressed her. Marian Blair did not seem to be distressed or bent on acting on this suicidal ideation. She was merely identifying that the option had crossed her mind. Because it was not deemed to be a critical situation for her client, the respondent did not make note of the ideation in her report to Valley Cities.

1.23 On April 28, 1986, Marian Blair subjectively determined that, if she did not feel better by the end of the day, she would commit suicide by throwing herself off of a cliff. As of this time, she had not advised the respondent that she was actually contemplating suicide, only that she considered it as an option. Later in the day, Marian Blair's family dog was struck and killed by an automobile. This incident distracted her from attempting suicide.

1.24 During the April 30, 1986 therapy session Marian Blair again made reference to her suicidal ideation. She felt that her condition was deteriorating, rather than improving. She was feeling more and more depressed. The only response she recalls receiving from the respondent was the statement, "Maybe it's not worth it to endure that much pain. " In making this statement, the respondent explains that she meant that therapy can produce the relief being sought.

1.25 In approximately January, 1986, the respondent advised Marian Blair that she believed her to be "gifted." She defines a gifted person as being one who manifests abilities or strengths in areas that are not common. She found Marian Blair to be artistic and sensual in ways that were not common.

Since Marian Blair was a broad, sensitive, and creative person, she was, in the respondent's opinion, gifted.

1.26 According to the respondent, the concept of giftedness provided her client with an understanding of why others were not responding as she expected. She considers the concept of giftedness to be a tool for therapy, not a diagnosis. If Marian Blair had rejected the concept, the respondent claims she would have replaced it with another which focused on negotiating with those causing her pain so that she could gain a more comfortable position in her personal relationships.

1.27 According to the respondent, the concept of giftedness spotlights unique behaviors. A gifted person will often get into trouble because of unique thoughts or behaviors. These unique thoughts and behaviors create discomfort in others and thus are socially undesirable. This is especially true of gifted females who are expected to be submissive to the male. One of the consequences of giftedness is isolation from ordinary people. The remedy is to seek community with other gifted persons.

1.28 In approximately June, 1986 the respondent formed an association of people deemed to be gifted and invited Marian Blair to attend. The association was intended to be an educational and informational group, not one involving therapy. By mutual consent, the participants often discussed personal matters during the meetings. Marian Blair requested that the association not solicit men to become members as they had a tendency to discount her abilities. Six women joined the group. Initially the association met at the respondent's office, but later moved to her home. While a member of this group, the respondent described herself as also being gifted.

1.29 Marian Blair claims she subjectively had difficulty accepting the concept that she was gifted. While there was some hesitation expressed by her during therapy, the credible evidence supports a finding that she relished the concept. Insights about giftedness made during the group meetings were discussed during therapy sessions. Marian Blair's reaction was to continually seek reaffirmation of her giftedness status. The respondent provided the affirmations and reaffirmations her client desired. Marian Blair talked of

being excited and relieved when she was told that her giftedness was legitimate. When the respondent asked if she wanted to drop giftedness as a tool, Marian Blair gave a negative answer. Marian Blair never rejected the concept of giftedness.

1.30 Marian Blair considered herself to be a "spiritual" person. During meditation she created mental images of persons to whom she addressed her spiritual questions. She identified these images as "grandmothers" and "spirit helpers." She referred to these entities and their guidance in her private journals. She found it possible to write about her spirituality in her journals, but was extremely reluctant to vocalize her thoughts on the subject. She feared that a therapist might diagnose her spiritual explorations as being indications of a mental disease.

1.31 The respondent acknowledges that she is untrained to address spiritual matters raised during therapy. She had no way of evaluating Marian Blair's spirituality either before or after therapy. During therapy, she told Marian Blair that she would work with her concepts of spirituality and would support her in all spiritual pursuits which were

legitimate to her. If the respondent found she was unable to address spirituality problems due to a lack of expertise, she would refer Marian Blair to a source of expert help.

1.32 In approximately late April or early May of 1986, Marian Blair told the respondent she feared that, if she expressed her spirituality concerns in therapy, she would be adjudged mentally ill. She had recently read an article by a woman who was placed on medication after she had discussed her spirituality with a therapist. The respondent told Marian Blair, "Unconventional experiences can and often do get misinterpreted by mental health professionals." The respondent advised Marian Blair that she should not raise spiritual revelations in mental health settings, as they could be construed as being signs of mental disease. During this discussion, Marian Blair told the respondent of her thoughts of grandmothers providing her with guidance. Since her mother was not a nurturing person, she borrowed the image of grandmothers to provide a forum for addressing her spiritual questions and for assessing pain that she was feeling.

1.33 During the therapy session of May 14, 1986, Marian Blair was feeling very vulnerable. She describes the

feeling as being "like a new born baby." After the first hour of treatment, the respondent suggested that her client remain for an additional hour, as she had a very important subject to bring up that should not wait until the next scheduled session. During the subsequent hour, the respondent inquired as to whether Marian Blair had ever considered being sexually involved with a woman. Although Marian Blair had not raised the question of sexual orientation as an issue, she felt that, as a clinician, she had identified an area of possible stress that should be addressed. She noted that Marian Blair had repeatedly complained of a lack of being able to connect with men. She further noted that, from her experience, clients are generally not sophisticated in identifying all of the causes of their symptoms. She feels that it was her duty as a therapist to raise this issue to help her client identify and understand what is happening to her. This would also allow her client to marshall the resources necessary for her to cope with it.

1.34 The subject of lesbianism was raised by the respondent as a general inquiry. It was not personalized. Marian Blair felt confused. She already felt as vulnerable as a new born during the first hour of therapy and was now

exploring a question of her sexual orientation. She acknowledged knowing of lesbianism but did not identify herself as one. She also acknowledged that she frequently sought emotional responses from women, but had never found herself physically attracted to one. The respondent did not identify herself as a lesbian, although Marian Blair suspected the same.

1.35 After the May 14, 1986 discussion about lesbianism, Marian Blair began to form a romantic interest in the respondent. Her romantic feelings became sexual in nature during July. She was delighted to find that she could feel this way toward another woman. She began to find sexual connotations in the words and gestures of the respondent during therapy. These romantic and sexual feelings were never expressly communicated to the respondent.

1.36 After the question of sexual preference was raised, Marian Blair saw the following therapy sessions as being "sexualized." Sexual issues were more frequently discussed than during earlier sessions. The use of her given name, Marian, by the therapist became very personal. The

respondent's frequent use of such words as "dear," "precious," and "beautiful" were seen as being sensual. Remarks by the respondent that she liked "therapy, sailing and love making" and "to put her mouth on things" were seen as sexually suggestive. Marian Blair even considered the positioning of a chair by the respondent as being seductive. She came to think more about her relationship with the respondent than about her concerns regarding Tony Williams, her parents or her children.

1.37 The respondent acknowledges that she frequently uses words that are capable of interpretation. She did not intend for any of the words or phrases she used have a sexual meaning. If her client gave a word or phrase she used an unintended meaning, she was unaware of it as it was not communicated to her. The respondent also acknowledges that she will often position her chair to assist clients in being more comfortable during therapy. No other meaning is intended by her chair's position.

1.38 By the summer of 1986, Marian Blair had developed significant respect and trust in the respondent's

skills. She worked with all of the concepts advanced by the respondent including the one that suggested she may be gifted.

1.39 During the June 6, 1986, counseling session the general focus was upon Marian Blair's acceptance of her giftedness. The respondent felt that the sources of Marian Blair's continuing frustrations were developmental restrictions placed on females in the pre-feminist society. She emphasized the feeling of wrongness often felt by women who deviated from the perceived standards in which both she and Marian Blair were born. The respondent found Marian Blair's participation in the gifted group to be wonderful as it supported and validated her position with the group. She told Marian Blair that it was "real powerful" for her that Marian existed.

1.40 During the June 11, 1986 session, the respondent suggested that, subsequent to therapy, she and Marian Blair should become friends. In this discussion about post therapy friendship, Marian Blair inquired about the concept of transference (a client's emotional reaction to a therapist wherein a client perceives that the therapist has the attributes of another influential person in the client's life,

usually a parent). The respondent stressed that no transference was involved, she only wanted friendship. She explained to Marian Blair that, as a therapist, she views her clients much like a parent views her child. A client will be guided through a developmental progression and then subsequently break away to become an independent person. She now wanted that independent person to become her friend. She noted that it was not uncommon for former clients to occasionally contact her after therapy had terminated. She always held back a little energy for them, if they needed it.

1.41 After the respondent suggested to Marian Blair that they could be friends, Marian Blair began to fantasize about its nature, first as a good friendship and then as an intimate sexual relationship. She saw the respondent as the person who had changed her life from being one in which she felt lost and vulnerable to one in which she felt joy. Her suicidal thoughts had been changed to a desire to be alive. Her relationship with her mother had been significantly improved.

1.42 During the June 18, 1986 therapy session, Marian Blair described her recent trip to Europe with her

mother. She noted that she has successfully applied concepts advanced by the respondent during therapy to cope with difficult situations she encountered in her relations with her mother during the trip. She praised the respondent for understanding her problems and providing the techniques to manage with them. The respondent answered that this praise produced in her an altered sense of her capacities. She went into an extended analysis about her own strengths and weaknesses.

1.43 On July 23, 1986, the twenty-ninth session, termination was first discussed. Marian Blair spoke of a desire for "doing something other than this with you." The respondent, after formally recording in her notes that termination was being discussed, moved to dispel any fears that her client might have about the impending social relationship. She noted that, although the formal structure was about termination, she would save some of her energy if that became necessary to use it during their impending social relationship. She emphasized that she wished Marian Blair to be strong enough to face the travails of life without constantly reverting to their former therapeutic relationship. The

conditions, terms and extent of the social relationship was discussed in detail during this therapy session. The respondent alluded to transference as it applied to other former clients but dismissed it as not being present.

1.44 The licensee defines termination as being a dynamic process that varies for each client according the client's needs. Since counseling often entails a tapering of negative symptomatology, termination is not a matter of precise schedule. She looks to see if the client is more connective and able to cope with the issues presented. As a therapist she must consider the client's fear of breaking the therapeutic bond, the possibility of relapse and any need for intensive follow-up care.

1.45 The respondent concluded that except for the issues concerning her relationship with Tony Williams, Marian Blair had resolved all of the issues she presented when she first sought therapy. All of her client's presenting issues and symptoms had either diminished or no longer existed. Marian Blair's basic personality had not changed, but she had a better idea of who she was. She was decisive. She had no panic attacks. She had decided not to renew her teaching

contract. She was not depressed. There were no further expressions of suicidal ideation. She had completed a successful trip to Europe with her mother. She was more assertive in her relationship with Tony Williams. She had no cyclical mood disorders. She was not immobilized. She was ready for termination by the end of July 1986.

1.46 On July 30, 1986, Marian Blair discussed her adolescent realizations of the limitations of her father. This moved into an extensive discussion of her seven year relationship with Tony Williams. The respondent remarked that Marian Blair should consider continuing that relationship. The respondent and Marian Blair then agreed that the next therapy session would Marian Blair then agreed that the next therapy session would probably be their last. The respondent inquired as to whether Marian Blair still wanted to have contact with her after therapy had terminated. Marian Blair immediately responded in the affirmative.

1.47 On or about August 14, 1986, while at her Lopez Island retreat, Marian Blair dictated a magnetic tape recording (gift tape) of her feelings toward the respondent. She delivered the gift tape to the respondent at the conclusion

of the next giftedness group meeting. In the gift tape she read a composition entitled BREATHING which she had written a number of years before. Following her reading of this composition, she recorded the following message:

Joan:

I miss you. I mean, everything's okay with me. I just -- I'll be glad to see you again. I don't know. I'm different. I've changed since I wrote that. I don't know if you'll be able to see the connections. But when I wrote that, I hadn't crossed over yet. I was on the other side and it was a time I was making another approach to the edge, but I didn't make it over. And now, because of your caring and your guidance and your astounding clarity about what I needed, and your really impeccable sense of timing, you got me to the other side, and now the bigness and the wholeness and the roundness and the mountains, they still take my breath away, but I'm not afraid to go toward them like I used to be. And now it's what I can't get enough of. And you, you're in that. You know, I really don't know anyone like you and it's not the therapist I'm talking about. I mean, I don't think you're just different in degree. In some ways, I think you're different in kind. There is something in you and I don't know what it is, but I want to be around it. You know, I used to look out from my house across this ridge of hills and I'd always get this feeling in my

backbone, up way down and does things. Any anyway, I used to think about, you know, that moment right before the music starts, that kind of stopped-time moment when the bow is poised over the strings and it seems like you can just feel the anticipation in the bow, and in the waiting, and in the strings. My backbone would get to feeling like a cello bow whenever I look at that ridge and like, I'd think, oh, I just want to fly over those hills. If only I could be lifted and swung through that little arc, you know, the graceful movement of the cellist's wrist and my backbone going over those hills till the music came out. I don't know how you go about trying to fulfill a longing like that, but I do know now that you don't push it aside and call it nonsense or allow it to be called nonsense. Oh, God, there is a part of me that is just going to be appalled and horrified and shocked and embarrassed after I give this tape to you -- you know that. But that's a part of what I'm trying to do here, it step out and speak out past that interference. So, this is me in the earliest beginnings of trying to practice what you've taught me and there is no way that the words by themselves are enough and my whole discovery of the words to live by was about living the meaning of them. And it seems like living "thank you" has a lot to do with letting in and loving and owning the gift. My new life, Joan, is such a thrill, to keep remembering that it's mine, and to keep owning it and claiming it and naming it and calling it mine. And I want

> you to know that I'm out here walking around and doing things and many times a day, many, many times a day, I'm aware that this walking and doing and living is a conscious 'thank you' to you. And that is only the beginning. Part of what I'm doing in this month of not seeing you, this going to the desert, and now here on the island and soon to be ocean, is touching the places that are meaningful in my life and stopping to honor this passing and do a kind of saying "good bye" to the things and the times that are falling away, but there is also a real thrill for me in thinking I get to say "hello" to you again.

1.48 The respondent accepted the gift tape as a validation of her therapy. It reflected that she had corrected Marian Blair's dysthymic disorder. Her client had feelings of support. The respondent also concluded that she was being recognized as a human being, not just as a therapist. Marian Blair disclosed information on the tape she had heretofore been reluctant to disclose even in therapy.

1.49 In response to the gift tape, the respondent sent Marian Blair the following card:

August 17, 1986

Precious Marian,

After the sound of your words on my being, I have been subdued and thoughtful-perhaps fuller than I was. I suppose I should be able to live without it - not what for once in my life I have heard someone speak truths that have touched my life with all the richness and rightness I crave - but must I?
Will you truly allow me to continue receiving and interacting with your magnificent appreciation of this universe?
You cannot possibly know how I marvel at you and your gift to me. I really must have you in my life - not to mention need when I consider responsibilities that might lie ahead. Now, as I think it might often be, I quietly anticipate our next meeting.

Joan

1.50 The respondent made no report of either the gift tape or her planned social contact with Marian Blair to Valley Cities.

1.51 During the final counseling session on August 27, 1986, the respondent expressed gratitude for the receipt of the gift tape and heaped accolades upon Marian Blair for her insight and her artistic recital. She suggested that

the two discuss the gift tape in more detail in a less formal setting. The respondent admits that during this session she was encouraging a relationship but denies that it had any sexual overtones. The respondent and her client mutually agreed to have a close association. The respondent alluded to a condition that was very right for her, but very private. She talked of her concerns about a close friend (Rosemary Unterscher) who had recently been diagnosed with breast cancer. She stated that if she could spend some time with Marian Blair it would be wonderful. She wanted to have contact with Marian Blair about things that were relevant to her. Marian Blair responded that she wished to be around the respondent just to say things. The exchange during this therapeutic session was exceedingly intimate.

1.52 During a conversation near the end of the final therapy session, the respondent offered to disclose her lifestyle. She remarked that, if the relationship between her and Marian Blair didn't work out, she had more to lose than the client. She alluded to the special recognition that Marian Blair had given her with the gift tape. Marian Blair stated, "How often do I get to see you and how much of you do I get

to have?" The respondent responded, "You see, I wonder how much you will want." Marian Blair answered, "I want all I can get." After observing that delays could result in a friendship never being formed, the respondent stated, "Lets start tomorrow."

1.53 It is clear from their conversation during the final therapy session that the parties were playing word games while attempting to ascertain the depth and scope of their future relationship. This was not a casual conversation relating to an occasional meeting for tea. It was a conversation prefatory to an intimate relationship with underlying sexual consequences. Assertions to the contrary by the respondent constitute denial of that which is readily apparent to even the most inexperienced listener and will not be credited.

1.54 The respondent acknowledges that if she and Marian Blair connected as friends, they could never return to a formal therapeutic relationship. A therapist's relationship a client is usually in an unreal world where the therapist gives the client her undivided attention without interjecting her personal needs into that relationship. Clients often crave this

individual attention and want it to continue in a social setting. The respondent understands that when this occurs, it is an element of transference. Notwithstanding this knowledge of transference, the respondent merely dismissed it as not being present in her therapy with Marian Blair. She conducted no examination of her client to clinically ascertain its presence or absence. She simply did not consider its effect when starting the social relationship.

1.55 The respondent claims, "I never felt sexual towards Marian Blair during treatment. I never even perceived her as attractive. I did not initiate any conversation or pursue a therapeutic line from the standpoint of meeting my curiosity, my needs, my interests. I did not have such feelings towards her, and I had no clue that she had feelings of that nature toward me."

1.56 The respondent asserts that in her mind the social relationship contemplated between her and Marian Blair contained no commitments. She thought Marian Blair only wanted to get together to visit and to see if they had interests in common that they might want to share. The respondent asserts "There were no warning signals of another

agenda, some kind of influence." She claims that there was no display of euphoria which would be a warning signal to a therapist that the termination request was for reasons other than the completion of the therapy. The magnetic tape of the final therapeutic session contradicts this analysis. Marian Blair's responses were eager and euphoric in content. She stated that she knew that termination would lower barriers.

1.57 The exchanges between the respondent and Marian Blair in their final therapy session together with the gift tape put, or with reasonable inquiry, should have put the respondent on notice that her client had romantic feelings toward her. The assertions by the respondent that she had no inkling of Marian Blair's romantic interest in her simply defies credibility. Since their only contact, other than at the giftedness group meetings, was during therapy, it is evident that the romantic and sexual feelings of Marian Blair matured in that setting.

1.58 The respondent was aware that touch was terribly important to her client. Marian Blair had repeatedly emphasized the need for touch. The respondent considers sexual contact with a human being the ultimate form of

touching. She admitted that "I therefore believe that it would be very important to her to rapport with someone she wishes to be sexual with." She also knew that Marian Blair had a special appreciation of nature, that she was able to write and describe and that she liked conversations about nature.

1.59 On August 28, 1986, at approximately 3:30 p.m., Marian Blair and the respondent met at Saltwater State Park in South King County. The couple spent many hours at the park talking and walking and exchanging intimate thoughts and touches. During the course of their extended conversations in the park, the respondent disclosed that she was a lesbian. She also explained that she had been sharing living with another woman. While eating dinner near the park Marian Blair, in a tearful and emotional encounter, told the respondent that she was in love with her and wanted to have a sexual relationship with her. The respondent claims to have been totally shocked and astounded by this revelation. After their meal they returned to the park where their interchange became sexual in nature with the stroking of hair, kissing and the touching of breasts. The encounter continued until 4:30 a.m. the next morning.

1.60 On August 28, 1986 the bond between the respondent and Marian Blair that was established during the previous nine months of therapy was ongoing. It had not been broken by termination of therapy. The respondent engaged in sexual contact with her client while that relationship continued to exist.

1.61 Between August 28, 1986 and approximately August 3, 1988, Marian Blair and the respondent maintained an active sexual relationship. The respondent became and remains completely enamored with Marian Blair. She copied her clinical notes taken during therapy because they were so important to her. During this two-year relationship, they learned a significantly greater amount about each other than they ever had during the therapeutic sessions.

1.62 Marian Blair pursued her spirituality by joining a group that identified itself as "Medicine Wheel." Medicine Wheel is founded upon rituals derived from native American cultures. It has a nurturing program which involves only females. The respondent asserts that throughout the relationship, she supported Marian Blair's involvement with Medicine Wheel emphatically. She felt it was extremely

beneficial to Marian Blair as it involved nurturing and touching.

1.63 During the approximately two year relationship that the respondent and Marian Blair were lovers, they shared many experiences which became relevant to later action by Marian Blair. The couple frequently went to Marian Blair's tiny trailer on Lopez Island. In 1987, Marian Blair separated from Tony Williams and moved into a cabin in Black Diamond. The cabin contained a loft which was entered only from a ladder. The respondent would spend one or two nights a week with Marian Blair at her Black Diamond cabin.

1.64 Throughout their relationship, Marian Blair exchanged numerous pieces of correspondence with the respondent, especially when she was on vacation. The cards and letters contained expressions of love and devotion.

1.65 The respondent remained attached to her former lover, Rosemary Unterscher. She explains that she would not deny her former lover a position in the relationship, given their longterm relationship. She and Marian Blair also associated freely with members of the gay community and attended gay

rallies. At one point during the relationship, Marian Blair, unknown to the respondent, had sexual contacts with another female.

1.66 In February, 1988 when the respondent applied for registration as a counselor and subsequently as a certified social worker, she was fully involved with Marian Blair in an intimate sexual relationship. Termination of the relationship at that time would have been extremely traumatic to both her and Marian Blair. She didn't even consider it.

1.67 Early in their relationship, the respondent described to Marian Blair a physical confrontation she had had with Rosemary Unterscher while they were living in Alaska. After that confrontation she and Ms. Unterscher had adopted a "safe word" to be applied when matters became too intense for one of the partners to continue. When the word was spoken all activity would promptly cease. She suggested that she and Marian Blair now incorporate the safe word concept into their relationship. The word proposed by the respondent and accepted by Marian Blair was "asparagus."

1.68 Although the safe word was never used, Marian Blair later came to believe that the respondent introduced it as a way to lead to a sado-masochism relationship. Her belief was based upon the respondent's expression of support for lesbians with pierced nipples, having a sado-masochism photo and stating that she liked steel tipped shoes. She also believed that a photograph of the respondent with her hand on a holstered pistol which had been taken on a camping trip in Alaska years before displayed sado-masochistic tendencies.

1.69 From Marian Blair's prospective, her relationship with the respondent was an endless marathon of her being harangued by the respondent. She became fearful of the respondent due to the yelling and haranguing. When she attempted to respond, the respondent became louder and more insistent. This would cause her to fall into fits of crying and pleas to stop. The respondent would then become conciliatory and give expressions of love.

1.70 Marian Blair believes that the respondent ordered her to leave Tony Williams, asserted her father had abused her as a child and told her that she was not able to figure out her life because she was learning disabled.

1.71 As the relationship progressed, Marian Blair came to identify many events as being abusive. She acknowledges that they appear very minor when observed in isolation. However, in her mind they became abusive when taken together. Her incidents of abuse included the following examples:

(a) The respondent had pressured her to purchase food at a grocery store while they were at the Lopez Island retreat;

(b) The respondent had requested that she kill a fly;

(c) The respondent had purchased a ring for Rosemary Unterscher, her former lover;

(d) The respondent had operated a vehicle in an aggressive manner; and

(e) The respondent had been verbally abusive to her on many occasions.

1.72 Marian Blair also felt that comments made by the respondent during their relationship were abusive including the following:

(a) "Are you ever going to have fun?"

(b) "I might make a scene."

(c) "Get the gun." (A phrase used in a flippant manner when minor irritations were raised.

(d) "If things get worse, well we can both jump off a bridge."

1.73 Marian Blair maintains that at one time in the Black Diamond cabin the respondent came at her with her hands extended as though she were going to choke her while yelling and screaming. Marian Blair retreated to the loft and sat on a bed the couple frequently shared. She claims that the respondent came up the stairs in a threatening manner but no physical contact was made. The respondent denies any violence or intention of violence at any time during the relationship. Marian Blair acknowledges that no violent physical contact resulted from this affair.

1.74 The respondent denies that she ever approached Marian Blair in a threatening manner. She acknowledges that while climbing up the ladder, it was necessary for her to

extend her body over the end of the ladder to reach the mattress upon which the couple slept. She feels that the interpretation of her movements as being threatening by Marian Blair is the result of the Iskower phenomenon, a concept of an individual waking to see a body hovering over them and interpreting that hovering as being threatening. She at no time made any gestures towards Marian Blair which would simulate choking or approaching her in a menacing manner.

1.75 The respondent does not recall ever being advised by Marian Blair that her driving was in a manner that was frightening. She never intended to drive her vehicle in a manner that would be frightening. She observed that Marian Blair often gets very frightened of driving under any circumstances. She never drives more than forty-five miles per hour when on the freeway.

1.76 The respondent acknowledges many conversations with Marian Blair over a number of subjects but denies that she ever intended to be domineering. She recalls very, very few arguments with Marian Blair during their relationship. She acknowledges that she has a tendency to

explain a position she is taking in detail and to frequently repeat things. From her prospective most of the conflicts that occurred during the relationship she had with Marian Blair were in response to accusations made by Ms. Blair. She acknowledges that she was assertive, but claims that Marian Blair was also assertive.

1.77 The respondent recalls that-when arriving at Marian Blair's cabin one day in 1988, she would be accused of deliberately waiting or staying at work in order to be late. When she would discuss instances that occurred at work, she would be challenged as to what she was saying what meaning this was to have to Marian Blair. Frequently this was nothing but a casual comment about what happened at work. These constant challenges created a sense of frustration in the respondent but defends this frustration when she considered the allegations to be unjustifiable but persistent.

1.78 The respondent recalls an argument April 1988 when she explained to Marian Blair that she felt sexually attracted to another client. When Marian Blair inquired as to why she did not act on those feelings, the respondent became furious and yelled at her. The respondent wanted Marian

Blair to understand that she was the sole focus of her sexuality. She had even proposed marriage to Marian Blair.

1.79 In approximately summer of 1988, Marian Blair began to accuse the respondent of treating her like a stranger. The respondent had no idea of what her lover was speaking about. In late June or early July, she and Marian Blair explored their relationship in detail. The respondent stayed at the cabin four consecutive nights but did not promote any physical contact sensing that something was seriously wrong. The respondent subjectively determined that Marian Blair may be having a crisis with her sexuality. At the end of the four days the couple engaged in a sexual act. In the midst of this sexual encounter Marian Blair told the respondent that their affair was over. The respondent offered to make concessions to keep the relationship going.

1.80 The revelation from Marian Blair to the respondent that the love affair was over created shock and confusion. Marian Blair refused to tell the respondent what had happened or why it had happened. She failed to respond to the respondent's request that they enter therapy together.

1.81 On their final evening together on August 3, 1988 the couple spent a night in bed without sexual contact. The only physical contact was when the respondent put her arm over the waist of Marian Blair. The next morning, Marian Blair arose early and confronted the respondent with allegations of seduction and abuse. She further asserted that the respondent had terminated therapy too early in order to pursue her lust.

1.82 Shortly thereafter, Marian Blair went to the Abused and Battered Lesbian Association (AABL) where she received an analysis of being an abused lesbian. When she appeared at AABL for the first time, Marian Blair was extremely distraught. She cried through most of the initial interview. She accused the respondent of hours and hours of yelling and screaming, isolating her from her family and friends, humiliating her in public and making threats. Notwithstanding these verbal assertions, she recorded in an AABL questionnaire that there was no violence during the relationship, that she had never experienced abuse as a child or an adult, and that she was unsure as to whether she had ever experienced any sexual abuse.

1.83 When Marian Blair initially contacted AABL, she met with Debra Rutt, MSW, who told her that she had been abused by the respondent. Debra Rutt remarked "It is never okay for a therapist to be involved with a client." This statement provided confirmation to Marian Blair that she had been seduced and abused by the respondent. She was also told by another therapist, Laura Brown, Ph.D., that the respondent had terminated therapy prematurely. Marian Blair is now firmly convinced that all of the respondent's therapeutic techniques, including the concept of giftedness, were designed to isolate her for seduction.

1.84 Marian Blair has returned to therapy. She continues to receive therapy as of the date of the proceedings.

1.85 On or about November 29, 1988, Marian Blair directed a letter to the respondent which stated as follows:

> I'm beginning to learn something about boundaries. Many, many things are happening inside me. Many feelings. I am not ready to talk with you about it. It's time for me to be quite with it all. It's winter now. It's time to rest. The trees are showing me how to stop, how to drop off all the stuff & be still, how to be rooted and bare.

> I'm writing to say please don't call me anymore, at home or at work. Please don't come to my house or work to leave things or letters. If you want to communicate with me please do it through the mail. Please respect these boundaries, & don't ask me to defend, justify or explain them. Mostly I don't know what lies ahead. At this point I'm not making any major decisions about contact or no contact. In the future for the next few months I am going to be quite. You won't be hearing from me. (Maybe you remember what you said to your family when you went to Europe)
> I wish you well.
> I wish you the deep peace of wintertime.
> Take care.

Except for the personal delivery of a package to Marian Blair's home during her absence, the respondent has complied with the directions in this letter.

1.86 In approximately late February or early March, 1989, Marian Blair contacted the respondent in the parking lot at the Rainier School. The respondent's initial response to Ms. Blair's presence in the parking lot was that she was there to discuss reconciliation. She describes her emotional condition as being so shaken that she could not stand up. She went to Marian Blair's car and sat on the hood. Marian Blair screamed

at her to get off of the hood, opened her car door and threw out a bunch of personal items that the respondent had left at the cabin. The respondent was too distraught to respond to this activity. Marian Blair then handed the respondent a letter.

1.87 In the letter delivered during the parking lot encounter, Marian Blair demanded that the respondent (1) tell everyone what she done, (2) tell her employer, (3) stop seeing people who were vulnerable to the power of her voice, (4) stop contacting her family or herself, (5) enter anger management therapy, and (6) return all photographs. The respondent responded to these demands by merely continuing her correspondence with Marian Blair.

1.88 On or about September 22, 1989, Marian Blair initiated a law suit against the respondent. That law suit is no longer pending.

1.89 During 1990 the respondent wrote numerous letters to Marian Blair attempting to reconcile. Some of these letters contained derogatory statements about the qualifications of the therapists who were currently treating Ms Blair.

1.90 On Thanksgiving 1990 the respondent directed a lengthy letter to Marian Blair which contained the following paragraph:

> And when I have been exonerated and your cohorts have been exposed for what they are, I am going to publish a book. I already have considerable content as well as the title--no joke--THERAPIST BASHING: FOR POWER, PROFIT AND CHATHARSIS by Joan K. Heinmiller USW, ACSW; an autobiographical account. You want to bet that my effort at discretion regarding our evolving lesbian relationship was only my selfish effort at "swearing you to secrecy?" I wonder how it will feel to all of you to have your lesbianism and/or incestuous ulterior motives publicly scrutinized. I wonder how you will feel as a certified preschool teacher seeking employment after this whole mess is pressed through the legal sieve at your inauguration. I have virtually nothing to lose and everything to gain. I have made peace with myself, what about the rest of you?

1.91 Marian Blair complained to the department that the respondent had committed unprofessional conduct. On July 20, 1990, the respondent was advised of this complaint by Lloyd Goodin, investigator. She responded by filing complaints against the therapists currently treating Marian

Blair and against those individuals with whom Ms. Blair had come in contact at AABL. Efforts by investigator Goodin to discuss the Blair complaint with the respondent were thwarted. Throughout the investigatory process, the respondent provided no definitive information to the department concerning the Blair complaint.

1.92 On or about January 25, 1991, the petitioner requested that the respondent submit to a psychological evaluation to determine if she could continue practicing counseling and social work with reasonable safety to the consuming public. She was given the name of two mental health practitioners and told that she could chose one to do the psychological testing. After the respondent complained about the choice of practitioners, the petitioner withdrew its request for the evaluation.

1.93 The respondent feels that she has not violated any code, any ethic or any standard in her relation with Marian Blair. She considers their relationship completely private and the inquiry into its propriety as being intrusive. That people are intruding and drawing conclusions that are unrealistic has been devastating to her.

1.94 Subsequent to these incidents, the respondent has analyzed entries in the private journals and other writings of Marian Blair. Based upon her analysis of these writings, the accusations of abuse and the initiation of legal actions by Marian Blair, the respondent firmly believes that she suffers from paranoid schizophrenia. She considers it her duty to call this analysis to the attention of both the department and Marian Blair's present therapist. She has demanded that Marian Blair be referred to a psychiatrist for a formal psychiatric evaluation.

1.95 The respondent has submitted volumes of correspondence to the department advocating a psychiatric evaluation of Marian Blair and criticizing the treatment provided by current therapists treating Marian Blair.

1.96 Between September, 1988 and the date of these proceedings, the respondent has been receiving psychotherapy, primarily associated with her attention deficit disorder, from Ralph L. Bass, M.D., a psychiatrist in private practice. In the opinion of Dr. Bass, the respondent is not mentally ill. She does not currently pose a risk to the public, nor will she likely pose a risk in the foreseeable future. In his

opinion, there is absolutely no likelihood of the circumstances which led to the relationship between the respondent and Marian Blair to be repeated. She has learned from this experience and has the capacity to modify and conform her behavior to the present requirements of law. Dr. Bass further believes that the respondent has a firm conviction that Marian Blair suffers from a psychosis which is being ignored. It is this firm conviction that is causing her to advocate for Marian Blair, not an effort to distract attention from herself.

1.97 Dr. Ralph L. Bass knows of no ethical standards that were in place in 1986 which disapproved of social workers, counselors or therapists having relationships with either present or former clients. However, in his opinion, sexual relations between a therapist and a client is damaging to the client.

1.98 Robert I. Fink, Ph.D., a supervisor of social workers and professor of social work, stated that the standard of care governing therapists during 1985 and 1986 was that a therapist and a client could not have social contact for a minimum of two years after the discontinuation of therapy. This standard is not found in any code of ethics published

during that time by professional organizations for either counselors or social workers. Studies by institutions of research and learning record that the ethical consequences of social contacts, including sexual relationships, between therapists and clients was still open to debate. The presiding officer finds that by his close association with counselors and social workers, Dr. Fink is qualified to testify as to his understanding of the ethical standards in Western Washington at the time of the incidents described herein. However, the standards described by him do not appear to be supported by any of the published codes of ethics of professional organizations. Research material indicates that the matter is still open to question in most jurisdictions.

1.99 Dr. Robert I. Fink also identified that neither therapy nor the therapist-to-client relationship terminates with the final counseling session. After listening to magnetic tapes of five of the last six therapeutic sessions between the respondent and Marian Blair, Dr. Fink determined that issues raised by Marian Blair at termination were avoided by the respondent. These termination issues were avoided for the reason that the relationship was going to continue after

termination. The respondent had specifically advised her client that she would hold back a few bits of energy after termination to resolve issues that may linger. In his opinion, these qualifications meant that therapy never effectively terminated. In his opinion, the social relationship merely took the place of therapy and continued thereafter. This testimony and opinion is credible.

1.100 In analyzing the letters directed to the department by the respondent, Dr. Fink felt that the respondent was confused as to her relationship. She is both a former therapist and a former lover. She now was presenting herself as a caretaker for Marian Blair. Her basic tone implies that she was still deeply in love with Marian Blair, cares for her and believes that she is being mistreated by current providers. She is seeking to have Marian Blair accept her direction for treatment. The respondent admitted this during her testimony.

1.101 Based upon his analysis of the tapes and the letters prepared by the respondent, her entry of a social and sexual relationship with her client within two years of therapy, her advocating for a former client currently in therapy with

another and her confusion about her present status with her former client, Dr. Fink believes the respondent presents a threat to the public health, safety and welfare in her role as a licensed counselor and certified social worker.

1.102 Dr. Robert I. Fink also is of the opinion that, based on the material he reviewed, the actions of the respondent reflect upon and lower the standard of the therapeutic industry in the eyes of the general public.

1.103 The respondent acknowledges to having established a social relationship with another former client, but that was after seven years had elapsed from the last therapeutic session.

1.104 The respondent desires to remain in family therapy. She notes that she specializes in therapy to people with disabilities, but wishes to continue to be able to serve the broader community as well. She does not want her sexual persuasion to be an issue that would limit her access to people. She wants to be a competent therapist.

From the foregoing findings of fact, the administrative law judge now enters the following conclusions of law:

CONCLUSIONS OF LAW

2.1 Registration for counselors and certification for social workers was first enacted by Laws of 1987, chapter 512, which became effective July 26, 1987. This act applies the Uniform Disciplinary Act, chapter 18.130, to registered counselors and certified social workers.

2.2 The respondent, Joan K. Heinmiller, is registered as a counselor and certified as a social worker pursuant to chapter 18.19 RCW and is subject to the provisions of RCW 18.130.180.

2.3 "Counselor" means an individual, practitioner, therapist, or analyst who engages in the practice of counseling to the public for a fee. RCW 18.19.020(6).

2.4 "Counseling" means employing any therapeutic techniques, for a fee that offer, assist or attempt to assist an individual or individuals in the amelioration or adjustment of mental, emotional, or behavioral problems, and includes therapeutic techniques to achieve sensitivity and awareness of

self and others and the development of human potential. RCW 18.19.020(5).

2.5 "Treatment" means assisting or attempting to assist an individual and does not include the initial assessment/evaluation. WAC 246-810-010(4).

2.6 "Certified social worker" means a person certified to practice social work pursuant to RCW 18.19.110. RCW 18.19.020(3).

2.7 Certified social work practice is that aspect of counseling that involves the professional application of social work values, principles, and methods by individuals trained in accredited social work graduate programs and requires knowledge of human development and behavior, knowledge of social systems and social resources, an adherence to the social work code of ethics, and knowledge of and sensitivity to ethnic minority populations. It includes, but is not limited to, evaluation, assessment, treatment of psychopathology, consultation, psychotherapy and counseling, prevention and educational services, administration, policy-making, research,

and education directed toward client services. RCW 18.19.110(3).

2.8 The common meaning of "client" is a person who engages the professional advice or services of another. Webster's Third World International Dictionary, G & C Merriam Company (1963). A client is a person who receives services or care from a registered counselor or certified social worker.

2.9 The definitions identified above together with RCW 18.19.010 establish the broad public purpose of the Counselor Registration Act.

2.10 The courts recognize that the relationship of a health care professional and his or her patient or client is a fiduciary one of the highest degree. It involves every element of trust, confidence and good faith. See Lockell v. Goodill, 71 Wn.2d 654, 656, 430 P.2d 589 (1967). (A fiduciary relationship exists between a physician and patient as a matter of law.) A fiduciary relationship between two persons may also exist either because the nature of the relationship between the parties is historically considered fiduciary in character or

the relationship between the parties is fiduciary in nature as a matter of fact. McCutcheon v. Brownfield, 2 Wn. App. 348, 356, 467 P.2d 868 (1970), Liebergesell v. Evans, 93 Wn.2d 881, 8980, 613 P.2d 1170 (1980). In other words a fiduciary relationship can be deemed to exist in fact in those cases and under those circumstances were a client justifiably expects her welfare to be cared for by another. The relationship between a mental health therapist, regardless of that person's professional label, and his or her client or patient is fiduciary in nature as a matter of law.

2.11 In 1985 and 1986 the respondent was a mental health care professional functioning as a therapist to Marian Blair. She was in a fiduciary relationship with her client which involved every element of trust, confidence and good faith.

2.12 In 1985 and 1986, as under the present statute, the Uniform Disciplinary Act for Health Professions, chapter 18.103, proscribed acts involving moral turpitude, dishonesty or corruption, RCW 18.130.180(1), incompetence, negligence or malpractice, RCW 18 130.180(4) and sexual

contact or abuse of a client or patient, RCW 18.130.180(24), by health care professionals.

2.13 Regulatory statutes have the broad public purpose of protecting health, safety and welfare. When considering an application for registration as a counselor or certification as a social worker, the petitioner may request information necessary to determine whether there are grounds for denial of registration or issuance of a conditional registration. RCW 18.19.090 and RCW 18.130.160.

2.14 The petitioner cannot impose a penalty upon the respondent for an act which, when committed, had no such consequence. Hammack v. Monroe Street Lumber Co., 54 Wn.2d 224, 339 P.2d 684 (1959). However, it can deny registration or impose conditions on registration if antecedent facts establish that an applicant is unfit to practice or poses a threat to the public.

2.15 Conduct may indicate unfitness to practice a profession or occupation without being directly related to the specific skills needed for practice. The conduct need not have occurred during the actual exercise of professional or

occupational skills, nor need the conduct raise general doubts about the individual's grasp of those skills. Haley v. Medical Disciplinary Board, 117 Wn.2d 720, 733, 818 P.2d 1062 (1991).

2.16 On a form prepared for the purpose of obtaining information from applicants for registration as a counselor, the petitioner was attempting to determine if antecedent facts reflected an unfitness to practice or the need to restrict registration. The petitioner must have complete and reliable information with which to evaluate applicants for registration, certification or licensure.

2.17 It is unprofessional conduct for any license holder or applicant to misrepresent or conceal a material fact in obtaining a license or registration. RCW 18.130.180(2).

2.18 Within RCW 18.130.180(2) a material fact is any fact upon which an outcome of the application process will depend. The suppression of a material fact which a person in good faith is bound to disclose is equivalent to a false representation. The concealment of a fact which one bound to disclose is an indirect representation that such fact

does not exist. Boonstra v. Stevens-Norton, Inc., 64 Wn.2d 621, 625, 393 P.2d 287 (1964).

2.19 If the respondent engaged in conduct within the past ten years which was described in RCW 18.130.180 as unprofessional conduct, she had a duty to disclose it to the petitioner so that it could be determined if registration should be issued, denied or conditioned. RCW 18.19.090 and RCW 18.180.160. The personal data section of the application for certification was designed for the petitioner to obtain material information concerning the qualifications and fitness of an applicant. Failure by an applicant to disclose material facts and information specifically requested constitutes unprofessional conduct. RCW 18.130.180(4).

2.20 The respondent has denied any conduct within the past ten years which was within the ambit of RCW 18.130.180. To establish a violation of RCW 18.130.180(4), the petitioner must show by a fair preponderance of the evidence that unprofessional conduct did occur.

2.21 It is unprofessional conduct for any license holder to commit any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not. RCW 18.130.180(1).

2.22 An act of moral turpitude, dishonesty or corruption is one which violates commonly accepted standards of good morals, honesty and justice indicating unfitness to practice the profession. In Re Hopkins, 54 Wn. 569, 103 P.2d 805 (1909), Haley, Supra, at 742.

2.23 As noted above fiduciary relationship arises as a matter of law between a mental health care professional, including counselors and social workers, and his or her client. When a counselor abuses this relationship for sexual gratification, she violates the trust, damages the client and demeans the profession. An act of sexual contact between a counselor and her client is not only contrary to good morals, but must be deemed an act which is base, vile and depraved.

2.24 While the sexual acts of the respondent may not constitute moral turpitude in a social setting, they are raised to

this level in the professional setting. The respondent, while still being viewed as a therapist, engaged in the seductive activities with Marian Blair which produced serious emotional depression. The acts served no other purpose than to provide the respondent with sexual gratification. Her acts involved moral turpitude, dishonesty and corruption. This was unprofessional conduct within the meaning of RCW 18.130.180(1) committed prior to registration.

2.25 It is unprofessional conduct for a license holder to commit abuse of a client or have sexual contact with a client. RCW 18.130.180(24).

2.26 Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.

2.27 The language of RCW 18.130.180(24) prohibits a counselor or social worker from having sexual contact with a current client. It does not prohibit a counselor from having sexual contact with a former client. Haley at 729. However, a medical practitioner who typically has an ongoing relationship with patients or clients can be found to have had

sexual contact with the same if the relationship continues to exist after treatment has ended. Haley at 730. While the duration of the therapist to client relationship cannot be measured with mathematical certainty, it can be deemed to continue to exist while the client remains dependent. Marian Blair remained dependent on the skills of the respondent for a substantial period of time after therapy had been formally terminated.

2.28 Marian Blair came to the respondent as a vulnerable client seeking treatment. This put the respondent on notice that she was dependent upon her knowledge and skill as a therapist. The respondent exercised psychological power and authority over Marian Blair solely by virtue of the relationship she had established with her as her therapist. The respondent's status as a therapist served as the basis for initiation of the sexual relationship. She used the trust and confidence she had achieved when serving as her therapist. Conduct of this nature creates disrepute on the counselor and social work professions in the eyes of the public.

2.29 The privilege of practicing counseling in this state is subject to the state's police power. The right to define

counseling and to determine when the practice is being performed belongs solely to the legislature. Whether counseling is being practiced is contingent upon the application of the legislative definitions, and not on the theories or definitions given by the practitioners applying concepts. During their sexual association, the respondent was consistently offering analysis and providing direction to Marian Blair in the very issues for which she had sought counseling in the first place. The claims of the respondent to the contrary are not supported by the evidence.

2.30 The relationship of therapist to client between the respondent and Marian Blair continued to exist after the termination of treatment.

2.31 Prior to registration and certification, the respondent committed unprofessional conduct by having committed acts of dishonesty, corruption or moral turpitude and by having had sexual contact with a present client. She had a duty to disclose this unprofessional conduct to the petitioner on her application for certification as a social worker.

2.32 The term "abuse" connotes injury resulting from a physical or verbal attack. While there were verbal exchanges during the two year sexual relationship between the respondent-and Marian Blair, the evidence doesn't establish that they reached the level of being abusive within the definition of RCW 18.130.180(24).

2.33 In her applications for registration as a counselor and certification as a social worker, the respondent committed unprofessional conduct by having misrepresented and concealed material facts. RCW 18.130.180(2).

2.34 To threaten is to express an intention to inflict evil, injury, or damage on another. State v. Brown, 50 Wn. App. 406, 409, 748 P.2d 756 (1988). The language contained in the Thanksgiving 1990 letter from the respondent to Marian Blair, then a complainant, was threatening.

2.35 It is unprofessional conduct for a registered counselor or a certified social worker to commit interference with an investigation or disciplinary proceeding by willful misrepresentation of facts before the disciplining authority or its authorized representative, or by the use of threats or

harassment against any patient or witness to prevent them from providing evidence in a disciplinary proceeding or any other legal action. RCW 18.130.180(22).

2.36 The respondent committed unprofessional conduct within RCW 18.130.180(22) by threatening her client who had become a complaining witness. However, she cannot be said to have otherwise interfered with the investigation as she committed no overt acts which prevented the petitioner's performance of its duties.

2.37 This unprofessional conduct by the respondent raises concerns about her propensity to exploit her professional position and tends to harm the standing of the profession in the eyes of the public. Both of these considerations lead to a reasonable apprehension about the public welfare. Under the Monroe Street Lumber Company, Supra, standard, the respondent cannot be punished for this prior misconduct. However, this prior misconduct can be considered when applying a penalty for the present violations of RCW 18.130.180(2) and RCW 18.130.180(22).

2.38 Upon a finding that a license holder has committed unprofessional conduct, the disciplining authority may issue an order providing for one or any combination of the following:

(1) Revocation of the license;

(2) Suspension of the license for a fixed or indefinite term;

(3) Restriction or limitation of the practice;

(4) Requiring the satisfactory completion of a specific program of remedial education or treatment;

(5) The monitoring of the practice by a supervisor approved by the disciplining authority;

(6) Censure or reprimand;

(7) Compliance with conditions of probation for a designated period of time;

(8) Payment of a fine for each violation not to exceed one thousand dollars per violation;

(9) Denial of the license request;

(10) Corrective action;

(11) Refund of fee billed to and collected from the consumer. RCW 18.130.160.

2.39 While the respondent does not appear to pose a threat to clients generally, she has displayed a propensity to commit unprofessional conduct when dealing with clients who have a sexual identity crisis or need counseling while adapting to an homosexual lifestyle. She has also displayed an inability to understand the magnitude of the harm that can be caused to these clients by her unprofessional conduct. Notwithstanding her failure to understand the damage she caused, revocation of the registration and certification of the respondent seems unduly harsh under the circumstances of this case. The public can be protected by imposing a deferred suspension conditioned on the restriction or limitation of her practice and the imposing of a fine.

2.40 In order to maintain minimum standards of competence and conduct in the practice of counselors and social workers, the suspension, restriction and limitation of the

practice and imposing of a monetary fine on the respondent is deemed to be in the public interest.

2.41 Generally, sexual misconduct with a client or patient by a medical practitioner is not considered incompetence, negligence or malpractice. See Standard Fire Insurance Co. v. Blakeslee, 54 Wn. App. 1, 771 P.2d 1172 (1989). (Sexual contact deemed unrelated to medical treatment for the purposes of malpractice insurance policy.) The evidence of the petitioner failed to establish that the respondent committed unprofessional conduct by demonstrating incompetence, negligence, or malpractice which resulted in injury to a patient or which created an unreasonable risk that a patient may be harmed. The respondent did not commit unprofessional conduct as identified in RCW 18.130.180(4). It is noted that if the respondent terminated therapy of Marian Blair while she suffered from a mental disease, such as paranoid schizophrenia, negligence, incompetence or malpractice may well have been found. Other than the respondents analysis of Marian Blair's writings, there is no evidence to support such a finding.

2.42 If the disciplining authority believes that an applicant may be unable to practice with reasonable skill and safety to consumers by reason of any mental condition, a statement of charges in the name of the disciplining authority shall be served on the applicant and notice shall be issued providing an opportunity for a hearing. The hearing shall be limited to the sole issue of the capacity of the applicant to practice with reasonable skill and safety. If the disciplining authority determines that the applicant is unable to practice with reasonable skill and safety for one of the reasons stated in this subsection, the disciplining authority shall impose such sanctions under RCW 18.130.160 as are deemed necessary to protect the public. RCW 18.130.170(1).

2.43 In investigating or adjudicating a complaint or report that an applicant may be unable to practice with reasonable skill and safety by reason of a mental condition, the disciplining authority may require an applicant to submit to a mental examination by one or more licensed or certified health professionals designated by the disciplining authority. In addition to any examinations ordered by the disciplining authority, the applicant may submit physical or mental

examination reports from licensed or certified health professionals of the applicant's choosing and expense. RCW 18.130.170(2).

2.44 The provisions of RCW 18.130.170 mandate a therapeutic evaluation by a medical professional in a clinical setting. If the petitioner has reason to believe that a practitioner is unable to practice with reasonable skill or safety, it must obtain an evaluation based upon a clinical examination. It cannot initiate action under RCW 18.130.170 from an evaluation of the acts of a practitioner by another medical practitioner. In the immediate case, the petitioner has not obtained a mental or physical evaluation of the respondent. The evidence is insufficient to establish that she cannot currently practice with reasonable skill or safety because of a mental or physical condition.

From the foregoing conclusions of law, NOW THEREFORE,

INITIAL ORDER

IT IS HEREBY ORDERED That in the public interest the disciplining authority shall suspend the registration as a

counselor and certification as a social worker of Joan K. Heinmiller for a term of three years and assess a monetary fine in the amount of one thousand dollars, Provided, That the imposing of the suspension term shall be deferred for a period of three years on the conditions that (l) Joan K. Heinmiller shall advise each clinic with whom she is associated of her status and the conditions pertaining thereto, (2) Joan K. Heinmiller shall treat no client who presents with sexual orientation, sexual identity, or homosexual adjustment issues either at the beginning or during therapy, and (3) that Joan K. Heinmiller shall commit no act in violation of chapter 18.19 RCW or chapter 18.130 RCW. Any violation of the terms of this deferral shall result in the immediate imposing of the three year suspension term which shall be in addition to any other penalty which may accrue for subsequent violations.

IT IS HEREBY FURTHER ORDERED That the allegations that Joan K. Heinmiller committed violations of RCW 18.130.170 or RCW 18.130.180(4) as identified in paragraphs 15 and 17 of the statement of charges be and the same are hereby dismissed.

DATED at Olympia, Washington, this 25th day of September, 1992.

/James D. Stanford/
James D. Stanford
Administrative Law Judge
Office of Administrative
Hearings

APPENDIX H

Statutes

28 U.S.C. § 1254(1)

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

RCW 18.130.180. Unprofessional conduct

The following conduct, acts, or conditions constitute unprofessional conduct for any license holder or applicant under the jurisdiction of this chapter:

(1) The commission of any act involving moral turpitude, dishonesty, and corruption relating to the practice of the person's profession, whether the act constitutes a crime or not. If the act constitutes a crime, conviction in a criminal proceeding is not a condition precedent to disciplinary action. Upon such a conviction, however, the judgment and sentence is conclusive evidence at the ensuing disciplinary hearing of the guilt of the license holder or applicant of the crime described in the indictment or information, and of the person's violation of the statute on which it is based. For the purposes of this section, conviction includes all instances in which a plea of guilty or nolo contendere is the basis for the conviction and all proceedings in which the sentence has been deferred or

suspended. Nothing in this section abrogates rights guaranteed under chapter 9.96A RCW;

(2) Misrepresentation or concealment of a material fact in obtaining a license or in reinstatement thereof;

(3) All advertising which is false, fraudulent, or misleading;

(4) Incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed;

(5) Suspension, revocation, or restriction of the individual's license to practice the profession by competent authority in any state, federal, or foreign jurisdiction, a certified copy of the order, stipulation, or agreement being conclusive evidence of the revocation, suspension, or restriction;

(6) The possession, use, prescription for use, or distribution of controlled substances or legend drugs in any way other than for legitimate or therapeutic purposes, the addiction to or diversion of controlled substances or legend drugs, the violation of any drug law, or prescribing controlled substances for oneself;

(7) Violation of any state or federal statute or administrative rule regulating the profession in question, including any statute or rule defining or establishing standards of patient care or professional conduct or practice;

(8) Failure to cooperate with the disciplining authority by:

(a) Not furnishing any papers or documents;

(b) Not furnishing in writing a full and complete explanation covering the matter contained in the complaint filed with the disciplining authority; or

(c) Not responding to subpoenas issued by the disciplining authority, whether or not the recipient of the subpoena is the accused in the proceeding;

(9) Failure to comply with an order issued by the disciplining authority or an assurance of discontinuance entered into with the disciplining authority;

(10) Aiding or abetting an unlicensed person to practice when a license is required;

(11) Violations of rules established by any health agency;

(12) Practice beyond the scope of practice as defined by law or rule;

(13) Misrepresentation or fraud in any aspect of the conduct of the business or profession;

(14) Failure to adequately supervise auxiliary staff to the extent that the consumer's health or safety is at risk;

(15) Engaging in a profession involving contact with the public while suffering from a contagious or infectious disease involving serious risk to public health;

(16) Promotion for personal gain of any unnecessary or inefficacious drug, device, treatment, procedure, or service;

(17) Conviction of any gross misdemeanor or felony relating to the practice of the person's profession. For the

purposes of this subsection, conviction includes all instances in which a plea of guilty or nolo contendere is the basis for conviction and all proceedings in which the sentence has been deferred or suspended. Nothing in this section abrogates rights guaranteed under chapter 9.96A RCW;

(18) The procuring, or aiding or abetting in procuring, a criminal abortion;

(19) The offering, undertaking, or agreeing to cure or treat disease by a secret method, procedure, treatment, or medicine, or the treating, operating, or prescribing for any health condition by a method, means, or procedure which the licensee refuses to divulge upon demand of the disciplining authority;

(20) The willful betrayal of a practitioner-patient privilege as recognized by law;

(21) Violation of chapter 19.68 RCW;

(22) Interference with an investigation or disciplinary proceeding by willful misrepresentation of facts before the disciplining authority or its authorized representative, or by the use of threats or harassment against any patient or witness to prevent them from providing evidence in a disciplinary proceeding or any other legal action;

(23 Drunkenness or habitual intemperance in the use of alcohol or addiction to alcohol.

(24) Abuse of a client or patient or sexual contact with a client or patient.

RCW18.130.040. Application of chapter to certain professions--Authority of director--Authority to grant or deny licenses

* * *

(2)(a) The director has authority under this chapter in relation to the following professions:

(i) Dispensing opticians licensed under chapter 18.34 RCW;

(ii) Naturopaths licensed under chapter 18.36A RCW;

(iii) Midwives licensed under chapter 18.50 RCW;

(iv) Ocularists licensed under chapter 18.55 RCW;

(v) Massage operators and businesses licensed under chapter 18108 RCW;

(vi) Dental hygienists licensed under chapter 18.29 RCW;

(vii) Acupuncturists certified under chapter 18.06 RCW;

(viii) Radiologic technologists certified under chapter 18.84 RCW;

(ix) Respiratory care practitioners certified under chapter 18.89 RCW;

(x) Persons registered or certified under chapter 18.19 RCW;

(xi) Persons registered as nursing pool operators;

(xii) Nursing assistants registered or certified under chapter 18.52B RCW; and

(xiii) Dietitians and nutritionists certified under chapter 18.138 RCW.

(b) The boards having authority under this chapter are as follows:

(i) The podiatry board as established in chapter 18.22 RCW;

(ii) The chiropractic disciplinary board as established in chapter 18.26 RCW governing licenses issued under chapter 18.25 RCW;

(iii) The dental disciplinary board as established in chapter 18.32 RCW;

(iv) The council on hearing aids as established in chapter 18.35 RCW;

(v) The board of funeral directors and embalmers as established in chapter 18.39 RCW;

(vi) The board of examiners for nursing home administrators as established in chapter 18.52 RCW;

(vii) The optometry board as established in chapter 18.54 RCW governing licenses issued under chapter 18.53 RCW;

(viii) The board of osteopathic medicine and surgery as established in chapter 18.57 RCW governing licenses issued under chapters 18.57 and 18.57A RCW;

(ix) The medical disciplinary board as established in chapter 18.72 RCW governing licenses and registrations issued under chapters 18.71 and 18.71A RCW;

(x) The board of physical therapy as established in chapter 18.74 RCW;

(xi) The board of occupational therapy practice as established in chapter 18.59 RCW;

(xii) The board of practical nursing as established in chapter 18.78 RCW;

(xiii) The examining board of psychology and its disciplinary committee as established in chapter 18.83 RCW;

(xiv) The board of nursing as established in chapter 18.88 RCW; and

(xv) The veterinary board of governors as established in chapter 18.92 RCW.

(3) In addition to the authority to discipline license holders, the disciplining authority has the authority to grant or deny licenses based on the conditions and criteria established in this chapter and the chapters specified in subsection (2) of this section. However, the board of chiropractic examiners has authority over issuance and denial of licenses provided for in chapter 18.25 RCW, the board of dental examiners has authority over issuance and denial of licenses provided for in RCW 18.32.040, and the board of medical examiners has authority over issuance and denial of licenses and registrations

provided for in chapters 18.71 and 18.71A RCW. This chapter also governs any investigation, hearing, or proceeding relating to denial of licensure or issuance of a license conditioned on the applicant's compliance with an order entered pursuant to RCW 18.130.160 by the disciplining authority.

RCW 18.19.020. Definitions

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Certified marriage and family therapist" means a person certified to practice marriage and family therapy pursuant to RCW 18.19.130.

(2) "Certified mental health counselor" means a person certified to practice mental health counseling pursuant to RCW 18.19.120.

(3) "Certified social worker" means a person certified to practice social work pursuant to RCW 18.19.110.

(4) "Client" means an individual who receives or participates in counseling or group counseling.

(5) "Counseling" means employing any therapeutic techniques, including but not limited to social work, mental health counseling, marriage and family therapy, and hypnotherapy, for a fee that offer, assist or attempt to assist an individual or individuals in the amelioration or adjustment of mental, emotional, or behavioral problems, and includes therapeutic techniques to achieve sensitivity and awareness of self and others and the development of human potential. For

the purposes of this chapter, nothing may be construed to imply that the practice of hypnotherapy is necessarily limited to counseling.

(6) "Counselor" means an individual, practitioner, therapist, or analyst who engages in the practice of counseling to the public for a fee, including for the purposes of this chapter, hypnotherapists.

(7) "Department" means the department of licensing.

(8) "Director" means the director of the department or the director's designee.

RCW 18.19.050. Powers of director--Application of uniform disciplinary act--Public education program

* * *

(2) The uniform disciplinary act, chapter 18.130 RCW, governs the issuance and denial of certifications and registrations and the discipline of certified practitioners and registrants under this chapter. The absence of educational or training requirements for counselors registered under this chapter or the counselor's use of nontraditional nonabusive therapeutic techniques shall not, in and of itself, give the director authority to unilaterally determine the training and competence or to define or restrict the scope of practice of such individuals.

APPENDIX I

Constitutional Provisions

Article I

Section 9.

* * *

[3] No Bill of Attainder or ex post facto Law shall be passed.

Section 10. [1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Article VII

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX J

Department of Health

[Constitutional issues concerning retroactive application of law were expressly raised by pre-hearing motion and argued and decided initially before Administrative Law Judge Stanford at the outset of the hearing. RP at 5-14. The issue was further addressed thereafter in the hearing and the Administrative Law Judge decided this issue in Conclusion of Law 2.14, App. G at 58 and 2.37, App. G at 66. The Review Judge also ruled on this in Conclusion of Law 2.15, App. F at 66.]

Superior Court

[Portion of Table of Contents to Heinmiller's Trial Brief Filed on September 30, 1993 to Superior Court Demonstrating Constitutional Issues Raised]

[Voluminous briefing and assignments of error are not included here but are in the record]

D. ARGUMENT

1. LICENSE REVOCATION PROCEEDINGS, SUCH AS THOSE CONDUCTED PURSUANT TO RCW 18.130.180, ARE QUASI-CRIMINAL. THE REVOKING AGENCY MAY NOT IMPOSE

DISCIPLINE FOR CONDUCT WHICH OCCURRED BEFORE THE ENACTMENT OF THE LICENSING STATUTE. ANY SUCH DISCIPLINE CONSTITUTES RETROACTIVE APPLICATION OF THE LICENSING STATUTE CONTRARY TO THE RULES OF STATUTORY CONSTRUCTION, AND IN VIOLATION OF BOTH DUE PROCESS AND THE PROHIBITION AGAINST EX POST FACTO LAWS 15

* * *

4. THERE WAS NO ISSUE OF RETROACTIVITY IN HALEY AS THERE IS IN THIS CASE. JUST AS HEINMILLER CANNOT BE RETROACTIVELY PUNISHED FOR A VIOLATION OF SUB-SECTION (24), NEITHER CAN SHE BE RETROACTIVELY PUNISHED FOR A VIOLATION OF SUB-SECTION (1) 38

* * *

11. THE STATE HAS VIOLATED THE FOURTEENTH AMENDMENT AND ARTICLE 1, SECTION 12 OF THE WASHINGTON CONSTITUTION BY DISCRIMINATING AGAINST PETITIONER ON THE BASIS OF

HER SEXUAL ORIENTATION.
FAR MORE LENIENT TREATMENT
HAS BEEN ACCORDED TO
HETEROSEXUAL HEALTH
PROFESSIONALS WHO HAVE
SEXUAL CONTACT WITH THEIR
FORMER PATIENTS 84

[Selected Portions of Heinmiller's Counsel's Argument to Superior Court, Raising Constitutional Issue on Retroactive Application of Law (Portion of Appellant's Supplemental Designation of Clerk's Papers Filed December 13, 1994 in Washington State Supreme Court)]

* * *

MR. LOBSENZ: I guess I want to start with the issue of what I believe is the improper retroactive application of the Credentialing Act.

As I understand it, everyone agrees that if there had not been a supposed post-act misrepresentation on the applications filed in October of 1987.

If there had been no misrepresentation, as I understand, it the Department is conceding nobody could look at any of this

stuff that happened before, and I'll just go straight to that to drive a point home.

* * *

What she did was not illegal. . . .

The State claims however that what they are doing and what Judge Stanford did, and what Judge Klein did, is simply considering the surrounding circumstances of the misrepresentation, which they've found, and decide what the sanction should be for the misrepresentation.

* * *

You cannot say that even though we had no law on the books that touched upon this in any way, we can take away your fundamental right because some people thought it was immoral or unethical or not what a good social worker would do. You can't do that.

* * *

One of the important things is the licensing revocation is considered quasi criminal.

* * *

[Y]ou cannot take away some ones livelihood for having done something that was legal at the time and it implicates all of those notions of due process.

You tell somebody these are the rules, and then you come back later and say, you know, we didn't tell you that there was a rule against this when you did it but now we are going to take away your right to make a living as a result of it.

* * *

I think it's the same reasons why vague laws are struck down, it's not giving anybody any warning, and I don't think -- there aren't very much absolutes in constitutional law but I think this is one much like the ex post facto clause which is an absolute, and I don't know of any exceptions to the ex post facto clause.

Washington State Supreme Court

[We are not including voluminous briefings to the Washington State Supreme Court on constitutional issues which are in the record. However we include assignments of error showing certain contentions on due process and equal protection.]

[Assignments of Error Within Appellant's Brief to Washington State Supreme Court filed December 13, 1994]

* * *

B. The Department violated Heinmiller's constitutional right to due process.

1. Did Heinmiller have sufficient and fair notice that her failure to report her relationship with a former client on her certification application could result in professional discipline as a violation of RCW 18.130.180(2)?

2. Was it constitutional for the Department to use the misrepresentation violation (RCW 18.130.180(2)) as a means to punish Heinmiller for conduct which pre-dated the application of the UDA to her and which was not otherwise unlawful at the time it occurred? Did the Department's approach constitute an ex post facto application of law?

* * *

D. The discipline imposed upon Heinmiller by the Department was arbitrary and capricious and an abuse of discretion.

1. Is the discipline imposed by the Department supported by substantial evidence and reasonably related to the alleged misconduct?

2. Is the discipline imposed by the Department the product of discrimination against Heinmiller in violation of her constitutional rights to equal protection and due process of law?

3. Is the discipline otherwise arbitrary and capricious?

[Due process and equal protection arguments concerning the discipline were set out in Appellant's Brief filed December 13, 1994, at pp. 44-50. First Amendment defenses to the "harassment" claim are set out in Appellant: Reply Brief filed March 13, 1994, at pp. 17-20.]

Supreme Court, U.S.
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95-1761

IN THE

Supreme Court of the United States

October Term, 1995

Joan K. Heinmiller,

Petitioner,

v.

Department of Health,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

SUPPLEMENTAL APPENDIX K

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APPENDIX K

THE SUPREME COURT OF WASHINGTON

No. 61901-8

JOAN K. HEINMILLER, Appellant,

v. ORDER

DEPARTMENT OF HEALTH, CHANGING OPINION

Respondent.

It is hereby ordered that the typewritten opinion of the Court filed in the above cause on October 5, 1995, be changed as follows:

The following words are changed to "M.B." wherever they occur in the opinion:

Marian Blair (Blair)
Blair
Marian

Dated this 12th day of October, 1995.

/s/ Madsen, A.C.J.
Chief Justice

APPROVED:

/s/ J.M. Dolliver